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REPORTS

John OF *White*

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

515

IN THE

SUPREME COURT OF ALABAMA,

DURING PART OF JUNE TERM, 1841, AND JANUARY TERM, 1842.

~~~~~  
BY THE JUDGES OF THE COURT.  
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VOLUME III—NEW SERIES.

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1842.

White *John*

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Wm *White*

OFFICERS
OF THE
SUPREME COURT, DURING THE TIME OF THESE DECISIONS.

JUDGES:

HENRY W. COLLIER, CHIEF JUSTICE.
HENRY GOLDTHWAITE, } ASSOCIATE JUDGES.
JOHN J. ORMOND, }

MATTHEW W. LINDSAY, ATTORNEY GENERAL.
JAMES B. WALLACE, CLERK.



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ADVERTISEMENT.

This volume, like those which have preceded it, will be found to contain many errors; they are, however, generally, unimportant, and will be readily corrected by the professional reader. These errors consist, mostly, in the substitution of one word for another, the omission of a word, and the omission or substitution of letters: they are attributable to a variety of causes, perhaps to none more than the haste with which the Reporters have read the proof-sheets.

The errors being such as we have stated, it is not deemed necessary to add an errata, which few, if any, will read.

REPORTS

OF

CASES ARGUED AND DETERMINED

JUNE TERM, 1841.

HANCOCK V. HOLMES.

1. An appeal from the judgment of a justice of the peace, cannot be tried at the first term of the Court to which the appeal is prosecuted, unless it appear that the appellee, his agent or attorney, has had five days notice of the appeal previous to the term to which the appeal is taken, or unless the constable return *non est inventus* to the notice issued by the magistrate.

Error to Talladega Circuit Court.

THIS was an action commenced before a justice of the peace, in which the plaintiff in error obtained a judgment for ten dollars. The defendant prosecuted an appeal to the County Court of Talladega. The proceedings before the justice of the peace, and his certificate, are as follows:

JAMES HANCOCK	}	MOTION.	Judgment for the plaintiff by default of the defendant, for the amount of plaintiff's demand and costs.			
V.			Debt,	:	:	\$10 00
WILLIAM HOLMES.			Costs,	:	:	93 3-4

I, John H. Townsend, a justice of the peace for said county, do hereby certify the above to be a true transcript of the proceedings in the above cause, from my docket. I do further certify the motion given the defendant in the cause, is lost.— James Hancock directed satisfaction to be entered upon my docket, which was accordingly done agreeably to plaintiff's

direction, but after this appeal was taken. Given under my hand and seal.

And at the return term of the appeal, the county court dismissed the appeal for want of prosecution.

From this judgment the plaintiff prosecuted a writ of error to the Circuit Court of Talladega county, and there assigned for error:

1. That the County Court erred in giving judgment against the plaintiff in error by default.

2. In rendering judgment against plaintiff in error for costs.

3. In rendering judgment of dismissal against plaintiff in error.

The Circuit Court affirmed the judgment of the County Court, from which judgment the plaintiff prosecutes this writ of error, and assigns for error the judgment of the Circuit Court.

STONE, for plaintiff in error.

MOORE, contra.

ORMOND, J.—The judgment of the Circuit Court in this case, cannot be sustained. The statute regulating appeals from the judgments of justices of the peace, provides that “no appeal shall be tried unless it appear to the court that the appellee, his agent or attorney, shall have had five days notice of such appeal previous to the term at which the same shall be tried, or unless the return of *non est inventus*, be made by the constable on the notice issued by the justice, and for want of such notice or return, the cause shall stand for trial at the ensuing term.” As there was no evidence that the appellee who was plaintiff before the justice, had notice of the appeal as required by the statute, the cause should have been continued to the succeeding term of the Court; it was therefore error in the County Court to dismiss the cause at the first term for want of prosecution.

It is, however, insisted by the counsel for the defendant in error, that the statement of the justice shows that the plaintiff had notice of the appeal. This he supposes is shown by the recital of the magistrate, that the *motion* given to the defendant is lost; *motion* being, as he supposes by mistake, written for notice. As, however, the proceeding was commenced by motion before the magistrate, (probably against a constable)

there can be no doubt that is the "motion" referred to by him, especially as no warrant is sent up, and no proceeding but the judgment was rendered on motion.

He also maintains that, as the plaintiff directed satisfaction to be entered on the docket of the magistrate after the appeal was taken, he therefore must have had notice of the appeal.

We do not think this by any means a necessary consequence; but if he did know that an appeal had been taken by the defendant, he certainly had a right to suppose that the appeal was abandoned by him, if as it is fair to presume, the satisfaction was entered in consequence of the payment by the defendant, of the judgment. Be this as it may, it is certain that no satisfactory evidence existed that the plaintiff had notice that an appeal was taken.

The judgment of the Circuit Court is therefore reversed, and the cause remanded.

JONES v. RIVES.

1. The expurgatory oath required by statute [Aikin's Digest, 283, § 127] to be taken by the defendant before the plaintiff, can be required to prove the execution of a written instrument, it being the foundation of the suit, only revives the common law, so far as to affect the particular case, and does not impose on the plaintiff the necessity of proving his case more fully than required by the common law.
2. Where a note is executed by one partner during the existence of the firm, its effect, *prima facie*, is to bind all the members, and this *prima facie* intendment is not done away by a plea that the note was executed by one of the partners for his sole and individual debt. The onus of proof of the consideration of a promissory note, cannot be thrown on the plaintiff by any mode of pleading.

Writ of error to the Circuit Court of Greene county.

Action of assumpsit on a promissory note.

THE declaration alleges that the defendant and one Calvin Jones, being merchants and partners in trade, under the name and firm of C. Jones & Co., made their promissory note, &c.

The defendant pleaded,

1. *Non assumpsit*.

2. That he never made the note sued on, nor ever author-

ised any one to make it for him, and that the same is not his promissory note.

3. The same as the second, with the additional averment, that the note sued on was made by Jones for his own private and personal debt, and the same was not made for any debt or demand, or upon any contract existing or contracted by the firm of C. Jones & Co.

4. Similar to the third, except the consideration of the note is averred to have been money loaned to Jones on his private and personal account, which was well known to plaintiff.

The two first pleas, conclude to the country; and the two last, with a verification; and all were verified by the oath of the defendant. Issues were joined without any replications, and tried by a jury who found for the defendant, on which verdict, judgment was rendered.

A bill of exceptions was signed at the instance of the plaintiff, which discloses that a witness was shewn the note described in the declaration, and signed C. Jones & Co.; the witness stated that he was acquainted with the parties; that the defendant and one Calvin Jones, were merchants and partners in trade during the year 1836, (in which year the note was dated) under the name of C. Jones & Co.; that during some part of that year the plaintiff acted as a clerk in the store of C. Jones & Co., but for what time the witness did not know; that he saw the plaintiff in the spring of that year, lend the defendant one hundred dollars; that he had seen Jones write, and the signature of C. Jones & Co. to the note, was in his hand writing; that he did not know what the note was given for. Thereupon, the plaintiff offered to read the note to the jury as evidence, under the issues joined. The Circuit Court held that the plaintiff under the issues, was bound to prove that the note was given for a consideration connected with the business of the firm, and that the note could not be read in evidence until such evidence was given. The note was excluded from the jury, and the plaintiff excepted.

He now prosecutes this writ of error, and assigns that the Circuit Court erred in excluding the note from the jury under the evidence given.

JONES for the plaintiff in error, cited Chitty on Bills, 29, 30; 2 Starkie on Ev. 228, 229; Ridley v. Taylor, 13 East. 175;

Manning v. Norwood, 1 Ala. Rep. 429; Gow on Part. 61; Doty v. Bates, 11 John. 544. And insisted that the evidence was not only proper, but was conclusive until rebutted. In excluding the note, the Court assumed the province of the jury, and in effect, determined the case on the weight of the evidence.

CLARK, Contra.

GOLDTHWAITE, J.—1. It is very probable that the Circuit Court excluded the note from the jury, under the impression that the plaintiff was required, under the issues submitted, to shew the precise nature of the consideration for which the note was given. We apprehend it to be perfectly clear, that a defendant cannot, by any mode of pleading, compel the plaintiff to such a course. Certainly a promissory note imports a consideration as much as a sealed instrument; and where its consideration is denied, it rests with the defendant to shew affirmatively that it has none. •

It is not perceived that the case of a note executed by partners, can be governed by any other rules than those which apply to one executed by an individual. In neither case does the expurgatory oath required by the statute to be taken by the defendant, impose on the plaintiff the necessity of proving his case in a more ample manner than the common law required. Indeed, the expurgatory oath has no other effect than to revive the common law so far as the particular case is concerned. Aikin's Digest, 283, § 127.

By the common law, one partner has the authority to bind his co-partner in relation to matters of the co-partnership.—Each partner is the general agent of the other, and any act or admission made by one during the continuance of the partnership, will bind the other; or at least, such is the *prima facie* effect of the act or admission. Gow on Partnership, 235; Odiorne v. Maxey, 15 Mass. 44.

2. It is on this principle, undoubtedly, that it has so frequently been held, that a note or bill executed by one of a firm, is *prima facie*, sufficient to charge any other member of it. A bill or note is nothing more than a written admission of a debt, and when signed by one of a firm, it will bind all the members,

unless it is shewn to have been given for a consideration not binding on those who seek to be discharged. *Ridley v. Taylor*, 13 East. 175; *Doty v. Bates*, 11 John. 544; *Chitty v. Bills*, 45 Gow on Part. 61; 2 *Starkie's Ev.* 228; *Vallett v. Parker*, 6 Wend. 615; *Swan v. Steele*, 7 East, 210. In this case the parties have proceeded without any special replication; we must therefore, consider the replication as denying generally, the truth of the matter alleged in the plea, of which a very material portion is new and affirmative facts. The plaintiff alleges the execution by the defendant of the note sued on; this is denied by all the pleas, and thus in effect, they are pleas of the general issue merely. If, however, the new matter set out, changes their character into that of special pleas, then the affirmative facts must be established by the defendant.

The judgment of the Circuit Court is reversed, and the case remanded.

THE STATE V. COLEMAN AND OWENS.

1. An indictment for playing at cards in a store-house where spirituous liquors are retailed, must allege such to have been the character of the store-house when the playing took place; and it is not enough to aver, that spirituous liquors were retailed there when the indictment was found—the playing being charged on a previous day.
2. Where the defendant pleads not guilty to an indictment, containing three counts, and the entire cause is submitted to a jury who find a verdict as to one count, without responding to the others, the cause is at an end.

ON points referred as novel and difficult by the Circuit Court of Tallapoosa.

THE ATTORNEY GENERAL, for the State.

No counsel appeared for the defendants.

COLLIER, C. J.—The defendants, with others, were indicted in the Circuit Court of Tallapoosa, for gaming. The indictment contains three counts, but we do not deem it neces-

sary to notice any other than the first; that count charges that the defendants and those indicted with them, "on the first day of October, eighteen hundred and thirty-eight in the county aforesaid, did play at cards in a store-house, where spirituous liquors are retailed, contrary," &c.

The defendants moved the Court to quash this count, but their motion was overruled. They then demurred, and their demurrer being overruled, they pleaded "not guilty," and the cause was submitted to a jury, who found the defendants guilty upon the *first count*, and assess a fine against each of them of twenty dollars. Judgment being rendered accordingly, the Circuit Court referred the questions of law arising upon the indictment, together with others, to this Court as novel and difficult.

The terms of the act on which this indictment is founded, are as follows: "If any person shall play at any tavern, inn, store-house, for retailing spirituous liquors, or any other public house, or in any street, or highway, or in any other public place, or in any out-house where people resort, at any game or games, with cards or dice, such person or persons so playing, shall on conviction thereof by indictment, be fined a sum not less than twenty, nor exceeding fifty dollars."

The objection to the count we are examining is, that it does not charge the house at which the playing took place, to have been a "store-house for retailing spirituous liquors" on the first of October, 1838, but only alleges that such was its character at the time the indictment was found. Though it is not necessary to prove the offence to have been committed on the day stated in the indictment, but is allowable to show its commission at any time before the finding of the bill by a grand jury, provided the proof does not relate to a time so remote, that the statute of limitations would operate a bar; yet it is important that every thing essential to constitute the offence, should be shown to exist at the time it was charged to have been committed.— Tested by this rule, the indictment cannot be sustained: it alleges the playing at cards to have taken place previous to the finding of the grand jury, but does not show that the *locus in quo* was then a store-house for retailing spirituous liquors, but only that such was its character when the indictment was found.

The objection raised upon demurrer was not to a mere matter of form, but to a word very materially affecting the sense, and should not have been disregarded.

Other questions are referred, but the one considered being deemed decisive of the case of the defendants, it is not necessary to answer the others. Whether the verdict be a formal acquittal of them or not, upon the second and third counts, the submission of the entire cause to the jury, and their verdict responding to a part, must operate as a discontinuance of the remainder. The consequence is, the judgment is reversed.

HARRELL V. FLOYD AND WIFE.

1. Upon a trial of right of property, the claimant cannot question the validity of the judgment or regularity of the execution.
2. It is no objection to a witness that he married the widow of a co-executor of the claimant, on a trial of right of property, unless it be shown that her former husband waisted the estate of his testator, and that the witness obtained by the marriage, an estate chargeable with such devastavit.
3. Testimony, which is relevant, cannot be rejected because unaided by other proof, it will not make out the case. The effect of testimony can only be ascertained by a motion to instruct the jury.

Error to the Circuit Court of Madison.

This was a trial of right of property in four slaves, in which the plaintiff in error was the claimant, and the defendants in error, plaintiffs in execution.

The latter obtained a verdict and judgment. Pending the trial, a bill of exceptions was taken, from which it appears that the plaintiff offered in evidence, the writ of *feri facias* on which the levy was made, which issued against the claimant as surviving executor of George P. Harrell, deceased, which the defendant moved to exclude from the jury upon the ground, that there was no judgment upon which such an execution could properly issue; which motion was overruled by the court.

The defendant then offered as a witness, one Samuel Hatton, whose testimony was excluded, on motion of plaintiff's attorney,

because the witness had married the widow of a deceased executor of George P. Harrell, who in his life time, was co-executor with the claimant.

The defendant's counsel also offered as evidence, the return into the Orphans Court of Madison county, which had been spread upon the records of said court, of the sale of the slaves which belonged to the estate of George P. Harrell, deceased, made by his executors; the slaves in dispute having been proved to be the property of George P. Harrell, in his life time.

This paper is a list of the names of some negroes, with the name of the purchaser, and the price annexed. Included in the list, are the names of two of the slaves in dispute, which are thus stated: "Delila and child Margaret—Slaughter Harrell, \$427." The paper is headed, "list of negroes sold at Huntsville, on the 18th February, 1828, belonging to the estate of George P. Harrell, deceased, sold by his executors, to wit:

Signed, J. WIGGINS & C. HARRELL, Ex'rs."

To which is appended the following: "The within and foregoing amount of sales was delivered into this office to be recorded, the 11th day of June 1828, and was duly done the 25th of June 1830.

THOMAS BRANDON, Clerk.'

The defendant's counsel also offered the final settlement, which had been made by the executors of George P. Harrell, deceased, and which had also been recorded. This settlement is a statement of debts paid by the executors and of the assets of the estate in their hands, in which is included, the amount of the sales of the negroes, of the 18th February, 1828. The decree is in the following words: "I, Samuel Chapman, Judge of the County Court, do certify, that I have examined the accounts and vouchers of the executors of George P. Harrell, deceased, who have heretofore reported the said estate insolvent, but on examination, I find the estate sufficient to pay the claims presented and properly authenticated against it. The Executors have received, and are chargeable with the sum of nine thousand two hundred and fifty-four dollars, and they have paid and are liable to pay the like sum to the said claimants; given under my hand and seal, this 14th day of August, 1832;" which was also excluded from the jury. To all which the defendant excepted, and now assigns for error.

MOORE, for plaintiff in error, cited (1st Phillips on Evidence, 321, 324, 327. 3 Term Rep. 27; 7th ib. 62. 6th Porter's Rep. 219. 11th Seargeant & Rawle 430.

HOPKINS, contra, cited Aik. D. 180, sec. 14, 15; 4 Porter, 265.

ORMOND, J.—The questions presented on the record, are first, the propriety of the judgment of the court refusing to exclude the execution on defendants motion.

Second. The rejection of the witness, Hatton, on the motion of the plaintiff.

Third. The rejection by the court, of the record of the county court, as evidence to the jury.

1. It is settled as the law of this court, that in trials of right of property, a claimant is not permitted to question the validity of the judgment or the regularity of the execution under which the property is sought to be condemned. Such an inquiry being considered as foreign to the issue between the parties. [See *Stone v. Stone*, 1 Ala. Rep., N. S. 582. *Bettis v Taylor*, 8 Porter, 564.]

2. The reason assigned for the rejection of the witness Hatton, was that he had married the widow of a former co-executor of the claimant, on whose behalf the witness was called. It is difficult to perceive how this statement of facts could raise a presumption that he had any interest in the event of the cause. To make him interested, two other facts must be assumed. That the executor whose widow he married had waisted the assets of his testator, and that the witness had received by the marriage, an estate which was chargeable with such devastavit. As these facts are not shown to exist, and as they do not follow as a necessary consequence of the marriage of the witness with the widow of the deceased executor, the exclusion of the witness on that ground was erroneous.

3. The rejection of the record of the County Court presents a question of much graver import. The claimant appears to have derived his title to two of the slaves in question (and the other two are said to be issue born since, though that fact does not appear on the record,) by a purchase at his own sale of the estate of his testator in February, 1828. The evidence offered, consists of the return of the sale to the County Court,

signed by the executors and recorded, upon which the claimant is set down as the purchaser of two of the slaves; and also what purports to be a final settlement of the estate by the Judge of the County Court with the executors, in which they are charged with the proceeds of the sale of the slaves in February, 1828.

The question before the court below on this motion was, the relevancy of the testimony; its legal effect, or whether sufficient without the aid of other proof, to support the issue, could only come in question on a motion for instructions to the jury.

The rejected testimony was a record of the County Court in relation to the slaves in controversy, upon a subject, over which it had undoubted jurisdiction, and was therefore clearly relevant, and should have been admitted. The learned counsel for the defendant in error, maintains that the record was properly rejected, because there was no proof that the sale of the slaves was advertised, or that any of those steps were taken which the law requires in such cases, and without which, he insists that the sale is a nullity.

If this argument were admitted to be correct, it will not follow that the evidence was properly rejected. We are not informed that the whole proceedings relating to this estate in the County Court of Madison, are before us, and therefore it may be, that there is record or other proof of the facts in the power of the party to produce, the absence of which from the record, is now complained of. It is in the discretion of a party, to array his testimony in the order his judgment dictates, and if relevant, it cannot be rejected, because it does not support the issue, unaided by other proof.

The rejected testimony in this case, was relevant, and should have been admitted; the influence it was calculated to exert in the cause, or whether it was of any value, unaided by other proof, are questions not presented on the record, and therefore we abstain from the expression of any opinion concerning them.

Let the judgment be reversed and the cause remanded.

BREWSTER V. BUCKHOLTS, AND OTHERS.

1. Damages, as a compensation for the rents and profits, in an action of trespass to try title, can only be computed from the time when the title was cast on the plaintiffs. Heirs at law, therefore, cannot recover damages which accrued previous to the death of their ancestors.

Writ of error to the Circuit Court of Sumter county.

ACTION of trespass to try title. The defendant pleaded not guilty, on which issue a verdict was found and judgment rendered for the plaintiffs.

At the trial, it appeared that one Betsey Buckholts, was located on the land in controversy, on the 26th December, 1834, under the provisions of the 14th article of the treaty made with the Choctaw tribe of Indians, generally called the treaty of Dancing Rabbit Creek, and that the patent issued to her the 17th February, 1838. The defendant was in possession and cultivated the lands from 1835 to 1838, inclusive. Betsey Buckholts died about the 9th of February, 1838, and the plaintiffs, are her heirs at law. The Circuit Court instructed the jury that the plaintiffs were entitled to recover damages for the whole time that the defendant was shown to be in possession after the acquisition of title by the plaintiff's ancestress as well before as after her death.

The defendant excepted to this charge and now assigns that the Circuit Court erred in giving it to the jury.

CLARK, for the plaintiff in error.

THORNTON, contra.

GOLDTHWAITE, J.—This matter is too clear to require illustration. The supposed injury done to the freehold of the ancestress, could only be redressed by a personal action, and the remedy, by the common law, was at end an at the death of either the disseizor or disseizee. It was held in the case of *Blake-ney vs. Blakeney* (6 Porter, 109,) that the action of trespass *quare clausum fregit*, does not survive, so as to enable the

personal representative to maintain an action for a trespass to lands entered upon in the life time of his testator or intestate; therefore it may be conceded, that unless the heirs can recover that no remedy exists for the injury done.

This is certainly true in this case, but it is only one of many to which the maxim of *actio personalis moritur cum persona*, applies.

Let the judgment be reversed and the case remanded.

CALHOUN V. COZZENS.

1. Upon a motion to quash an attachment, every thing stated in the proceedings must be taken to be true, and nothing beyond, shall be intended prejudicial to the plaintiff.
2. It will not be inferred against the plaintiff on a motion to quash, that he is a non-resident, merely because the affidavit on which the attachment is founded, goes beyond what is necessary, where the proceeding is by a resident creditor against a non-resident debtor; and because the bond is indorsed with the approval of the Judge of the county court. And such is the law notwithstanding the superfluous facts stated in the affidavit, and the approval of the bond would seem to indicate that they were intended to conform to the remedy when prosecuted by a non-resident creditor.
3. Where the fact of the plaintiff's non-residence does not appear on the proceedings in a suit by attachment, if the defendant would avail himself of it to show their defectiveness, he must plead it in abatement.

THIS was a suit by attachment for the recovery of the amount of a promissory note, by the defendant in error against the plaintiff, in the Circuit Court of Tuskaloosa.

The affidavit, after properly describing the amount and evidence of the indebtedness affirms "that said Ewing F. Calhoun resides out of this State, so that the ordinary process of law cannot be served on him, and further, that said Ewing F. has not sufficient property within the State where he resides, in the knowledge of affiant, wherefrom to satisfy said debt; and that an attachment is not sued out for the purpose of vexing or harrassing the said Ewing F. Calhoun," &c.

The bond is in due form, attested by the Justice of the Peace

who issued the attachment and bears date the 6th August, 1840, with an endorsement as follows: "I approve the within bond August 22, 1840.

M. D. WILLIAMS, Judge C. Court."

The writ of attachment after reciting so much of the affidavit as declares the indebtedness of the plaintiff in error, proceeds as follows: "and oath having been also made, that the said Calhoun resides out of this State, so that the ordinary process of law cannot be served upon him, and the said Cozzens having given bond and security," &c.

At the return term of the attachment, the defendant moved the Court to quash the same, "because the affidavit is defective and insufficient, and because there is no such bond as the law requires, &c.;" which motion was overruled by the court. Thereupon, the defendant pleaded to the merits and the cause was submitted to the jury, who found a verdict for the plaintiff, and a judgment being thereupon rendered, the defendant has prosecuted a writ of error to this court.

PECK & LINCOLN CLARK, for the plaintiff in error.

J. L. MARTIN, contra.

COLLIER, C. J.—It is insisted by the plaintiff in error, that the proceedings in this cause were instituted under the ninth section of the act of 1833, "concerning attachments." Aik. D. 40. That section gives to a non-resident creditor the benefit of an attachment against his non-resident debtor, in the same manner as if he resided within this State: "*Provided*, that such non-resident, shall give good and sufficient security, residing in this State, to be approved by the Judge of the County Court, where the property or effects may be, or any Judge or Clerk of the Circuit Court, for the amount, and with the like condition as required in other cases; and that in addition to the oath now required by law, such non-resident plaintiff, his agent or attorney, before obtaining any such attachment as is authorised by this act, shall swear that the defendant against whom any such attachment is sued out. has not sufficient property within the State of the residence of said defendant, within the knowledge or belief of such non-resident plaintiff, his agent or attorney, wherefrom to satisfy such debt or demand."

The reasons it is said, why the proceedings should have been quashed by the Circuit Court, are

1. Because the bond was not approved until sixteen days after its date and the test of the attachment.

2. Because the affidavit is not as extensive as the *proviso* cited requires.

Upon the motion to quash, no intendment could have been made prejudicial to the plaintiff below, but every thing stated in the proceedings should be taken as true. *Lowry v. Stowe*, 7 Porter's Rep. 483.

Now it does not appear, either from the affidavit, bond or writ of attachment, that the plaintiff resided without this State, but we are required to infer that such is the fact, because the affidavit goes beyond what is necessary, where the proceeding is by a resident creditor against a non-resident debtor, and because the bond is endorsed with the approval of the Judge of the County Court. It is certainly true, that in order to obtain an attachment against a non-resident debtor at the suit of a resident creditor, the affidavit need only state the indebtedness and the non-residence of the defendant, and negative any impropriety of motive in suing out the same. Nor does the bond require approval in any other manner, than by the officer who issues the attachment; yet we cannot, according to any principle heretofore recognised, intend, in the absence of any direct or indirect allegation or recital, that the plaintiff below resided without the State. But the legal and reasonable presumption upon this record, is, that the plaintiff states more in his affidavit than was essential, and the indorsement of the Judge of the county court, was a mere act of supererrogation.

We do not deem it necessary to inquire, whether the refusal to quash an attachment, is in any instance, revisable on error, or whether the defendant should not, where his objection is to the affidavit or bond, resort to a plea in abatement. Aik. Dig. 38, sec. 3—Acts of 37, p. 62, sec. 4. In the case at bar, if the objection to the proceedings was available, it could only have been brought to the view of the court by a plea in abatement.

We have only to add, that the judgment is affirmed.

COTHRAN *et. al.* v. WEIR.

1. On appeal from a justice of the peace, the amount of damages laid in the declaration is matter of form, and cannot be looked to to show that the Court had no jurisdiction: that is ascertained by the amount of the recovery.

Error to the County Court of Cherokee.

THIS action was commenced before a justice of the peace by the defendant in error against the plaintiffs in error. The justice rendered judgment for the defendants below, from which the plaintiff appealed to the County Court of Cherokee. In that Court the plaintiff filed his statement, setting forth a special contract, on which he alledged there was due to him forty-nine dollars and fifty-seven cents; also, for work and labor, money paid at their request, &c. and laid his damage at one hundred dollars. The defendants pleaded non assumpsit, and the jury having given a verdict in favor of the plaintiff for twenty dollars, judgment was rendered in his favor for that amount, from which the defendants prosecute this writ of error.

The only error insisted on is, that the justice had no jurisdiction.

MOORE, for plaintiff in error.

J. L. MARTIN, contra.

ORMOND, J.—It is supposed that the justice of the peace had no jurisdiction in this case, because the damages are laid in the County Court at one hundred dollars. It is the amount of the recovery, and not the sum claimed, which settles the question of jurisdiction. But the amount claimed, both before the justice and in the County Court, was less than fifty dollars, and the actual recovery is twenty dollars. The assertion of damages in the declaration, is mere matter of form, and cannot be looked to, to ascertain whether the Court have jurisdiction or not.

Let the judgment be affirmed.

FOSTER, AND OTHERS V. HARRISON.

1. When a writ of error is sued out to remove a case from the county to the circuit court, and the record is not filed, but the writ of error is dismissed, and the judgment of the county court affirmed on certificate, the judgment entry must shew affirmatively, every fact necessary to authorise the judgment on certificate.
2. When the judgment entry recites that it appeared from the certificate of the clerk of the county court, that one of two defendants to a judgment in that court, prayed for and obtained a writ of error, and executed bond, &c. &c., the legal presumption is, that the writ of error was sued out by one, in the name of both defendants.

Writ of error to the Circuit Court of Greene county.

Judgment on the certificate of the Clerk of the County Court. The judgment entry recites that the defendant in error produced the certificate of the Clerk of the County Court of Greene county, showing a judgment at the November Term, 1839, against Foster & Allison; that Foster, on the 28th day of April 1840, prayed for and obtained a writ of error in said cause, returnable to the then present term of the Circuit Court, and gave bond according to law to prosecute the same, with John T. Hundley as security, and no transcript of the record in said cause having been filed, it was considered, &c., affirming the judgment with 10 per cent damages, interest and costs.

The defendants to that judgment here prosecute their writ of error, and assign as error, that it does not appear that Allison joined in suing out the writ of error.

JONES, for the plaintiff in error.

PECK, contra.

GOLDTHWAITE, J.—1. There is no question but that, according to the course of practice in this State, judgments such as this, must show every fact affirmatively in the judgment entry that is necessary to sustain the summary jurisdiction exercised by the court.

2. It is equally clear that the recitals of the judgment con-

form to this view with the utmost precision and correctness. The legal presumption arises, that both defendants were named as parties in the writ of error, when the clerk certifies that one of them prayed for and obtained the writ; because on such case alone, is the clerk authorised to issue it, or to supersede the judgment.

Let the judgment be affirmed.

CHILES V. BEAL.

1. According to the modern practice, *oyer* is not demandable of a record, unless it be of a deed enrolled, letters of administration, &c.
2. The proper mode of taking advantage of a misrecital of a record in pleading, is, by the plea of *nul tiel record*, concluding with a prayer that the same may be inspected by the Court. A demurrer in such case, would not avail the defendant, because the record misrecited, does not become a part of the proceedings in the cause, until it is made such by bill of exceptions.

THIS was a proceeding by *scire facias* against bail in the County Court of Greene county. In the *sci. fa.* the action in which the defendant was bail, is described as an action of "trespass on the case upon promises." The record was vouched in usual form, but no profert was made of the bail bond.

The defendant craved *oyer* of the recognizance of bail, and the entire record of the cause in which bail was taken, set them out at length and demurred. The writ in that cause called upon defendant to answer to the plaintiff "in a plea of trespass on the case upon promises," while the condition of the bail bond, in reciting the writ, stated that the defendant was required to answer "in an action of trespass." The plaintiff joined in demurrer; and the demurrer was sustained. To reverse that judgment, a writ of error has been prosecuted to this Court.

PECK & CLARK & J. B. CLARKE, for plaintiff in error.

MURPHY & JONES, for defendant.

COLLIER, C. J.—It is insisted for plaintiff in error, that as oyer cannot be had of a record, no objection could have been taken on demurrer to a defect in the bail bond.

Oyer it is said, was formerly demandable, not only of *deeds*, but of *records*; but by the more recent practice, it is not granted of a record. The King v. Amery, (1 T. Rep. 150;) unless it be a deed enrolled, letters of administration, &c. of which profert is made. (1 Arch. Prac. 164.) Of *private writings not under seal*, oyer never could be claimed of right, but Courts will sometimes make an order for their production, so as to enable the opposite party to plead. (Tidd's Prac. 639: 8th ed.; 1 Saund. Rep. 9, d. n. (g); Stephen on Plead. 69, and notes 3, Amer. ed.; 1 Saund. Rep. 92, a. n. 3.)

The proper mode of taking advantage of a misrecital of a record in pleading, is not by a demurrer, but by the plea of *nul tiel record*, concluding with a prayer, that the same may be inspected by the court. (3 Salk. R. 330.) And this practice is dictated by the consideration, that the record misrecited, does not become a part of the proceedings in the cause, until it is made such by bill of exceptions. (9 Johns. Rep. 287; Dane's Ab. chap. 179, a. 13, s. 4.)

From this view, it will follow, that the variance (if any) between the bail bond actually executed, and that described in the *scire facias*, was not properly presented to the Court, for its decision.

As it is not pretended that the bail bond as described in the *scire facias*, is defective, the County Court should not have sustained the demurrer. And without inquiring whether the bond was described according to its legal effect, the judgment is reversed, and the cause remanded.

HALLETT V. LEE AND OTHERS.

1. On a motion against a sheriff, suggesting that by due diligence, the money due on an execution could have been made, a traverse of the allegations of the suggestion, would be an issue under the statute.
2. The sheriff may plead to such a suggestion any matter in excuse or avoidance, which would negative the allegation of want of proper diligence.
3. A plea, which merely states that the execution was levied a short time before the return day, a delivery bond taken and returned forfeited, without showing a sufficient excuse for the delay, is bad.
4. It is the duty of the sheriff to provide himself with a sufficient number of competent deputies to enable him to execute the mandates of the Court within the time prescribed by law.

Error to the Circuit Court of Bibb.

THE plaintiff in error gave notice to the defendant in error, the sheriff of Bibb county, and others, his securities, that a motion would be made against him for failing to make the money on an execution which came to his hands from the Circuit Court of Bibb county, on the 24th April, 1839, in favor of the plaintiff, against Jacob Mayberry, for twenty-six hundred and forty-six dollars, besides costs; the money on which it is suggested, could have been made by due diligence.

The sheriff appeared and pleaded that he levied the execution upon the goods of the defendant in execution, on the 9th September, 1839, and before the return day thereof; that the defendant in execution, executed a delivery bond, with surety, to deliver the negroes levied on upon the 23d September, 1839, the day advertised for the sale thereof; that the negroes were not delivered, and that ten days afterwards he returned the bond forfeited, and concludes with a verification.

To this plea the plaintiff demurred, which the Court overruled, and judgment was entered for the defendants.

The error assigned is, the overruling the demurrer.

CLARKE, for plaintiff in error.

J. L. MARTIN, contra.

ORMOND, J.—The statute which authorises a suggestion

to be made to the Court, that the amount to be collected on an execution, could have been made by the sheriff, "by due diligence," requires the Court, "forthwith, to cause an issue to be made up to try the fact." The counsel for the plaintiff insists that, as the issue must consist of a denial by the sheriff of the facts alleged in the suggestion, that no plea should be received.

The sheriff discharges himself from responsibility, by showing due diligence, and to enable him to do this, nothing more is necessary than to traverse the facts contained in the suggestion, and this was doubtless the issue which the act contemplates. But if the defence of the sheriff consists of new matter, or matter in avoidance, a mere denial of the allegations of the suggestion would not be sufficient, and he must therefore be allowed to make his defence by plea.

But the plea in this case does not traverse the facts of the suggestion, nor does it state any fact which can be received as an excuse for the want of due diligence.

The only fact stated in it is, that the execution was in fact levied about three weeks before the return day thereof, that the property was not delivered on the day appointed for its sale, and that the bond taken for its delivery has been returned by him forfeited. No excuse whatever, is offered for retaining the execution nearly five months without a levy; and we must therefore infer, that during the whole of that period there was no obstacle to a levy. The plea then, is in fact, a distinct admission of the charge in the suggestion, that by due diligence, the money could have been made, and it is difficult to conceive how such a plea could be seriously opposed by counsel, or gravely entertained by the Court. It has been remarked previously by this Court, that press of business is no excuse for a sheriff in failing to make money on an execution. In proportion to the amount of business in his hands, are the emoluments of his office, and it is his duty to provide himself with a sufficient number of competent deputies to enable him to execute the mandates of the Court, within the time prescribed by law.

The judgment of the Court below should have been for the plaintiff, and it is therefore reversed, and the cause remanded.

CATER AND GREENING V. HUNTER, ADM'RS.

1. A declaration describing a promissory note as bearing date in November, 1836, and payable on the *1st day of March, eighteen hundred and twenty-nine, meaning thirty-nine*, must be considered as containing a sufficient cause of action, after a judgment by default.
2. The defendant omitting to plead to such a declaration, thereby admits the cause of action as stated, and the damages may be ascertained by the clerk, without the intervention of a jury.

Writ of error to the Circuit Court of Conecuh county.

ACTION of assumpsit on a promissory note, which is described in the declaration, as dated on the 5th day of November 1836, and the averment is made, that thereby the said defendant promised to pay to the plaintiff's intestate the sum of one thousand dollars on the first day of March 1829, (meaning thirty-nine.)

The defendants suffered judgment to go against them by default, and now assign for error,

1. That the instrument declared on, will not maintain a special assumpsit.
2. That the averment is not sufficiently positive and certain; that the defendants by the said note intended to pay the said sum of money at a different time from that stated in the note.
3. The averments of the declaration respecting the supposed mistake should have been proved.
4. Judgment final could not properly be rendered without the intervention of a jury.

HAMMOND, for the plaintiffs in error, cited Chitty on Bills 354. 1 Chitty's Plead. 304, 307. Thompson vs. Gray, 2 S. & P. 60.

BOLLING, contra, relied on McGehee vs. Childress, (2 Stew't 50.)

GOLDTHWAITE, J.—1. The first and second assignments of error question the sufficiency of the declaration to charge the defendants.

The note is described according to its terms, and the declaration must be considered as insisting that the parties, by the words eighteen hundred and *twenty-nine*, meant the year of our Lord one thousand eight hundred *thirty-nine*.

It is very evident, when the date and time of payment is compared together, that there must be a mistake in one of these particulars. * The plaintiffs aver, in substance, that the mistake is in the time of payment, and, although the averment is not very precise or definite, we must intend it to be sufficient after a default; indeed, it is difficult to say why the allegation of what was meant by the note, would not be sufficient under any aspect in which this case could be presented. The question does not arise, how this averment was to be proved, if denied; nor need we consider how far the note itself would be evidence of the intention of the makers.

2. The defendants by suffering a default admitted the cause of action as stated in the declaration, and it was competent for the clerk to proceed and compute the damages according to the averments of the declaration, as the amount due was certain and ascertained by the note. If, as the defendants suppose, the mistake is in the particular of the date, then the defendants so far from being injured by the assessment of the clerk, have reaped a considerable benefit in escaping the infliction of ten years interest.

In the case of *McGehee vs. Childress*, (2 S. & P. 50,) it was held by this court, that a judgment by default, admitted the allegation of the declaration, that the event had happened, on which the note described in that case, became due.

The same principle must govern this suit.

Let the judgment be affirmed.

WILLIAMSON V. BROOKS, CLAIMANT OF THE ROBERT MORRIS.

1. The intervention of a claimant of a vessel libelled, and his entering into stipulation to pay and satisfy the decree, will render it unnecessary to make monition, so far as the claimant is concerned; and the libel will not be dismissed for the failure to do so, although the order of seizure, directs monition to be made generally.

THIS was a proceeding under the statute, in the county court of Sumter, in the nature of a libel in admiralty.

The libel alleged that the libellant caused to be shipped on the steam-boat Robert Morris, at the city of Mobile, sundry articles of merchandize, particularly described, consigned to himself at Gainesville, in the county of Sumter: that the merchandize was never delivered to the libellant, according to the terms of the bill of lading, or in any other manner. The Judge of the County court, to whom the libel was addressed, with a prayer, for that purpose, indorsed thereon his *fiat* in the following words:

"To the clerk of the County Court of Sumter county. Let a warrant of seizure issue against the within named boat, Robert Morris, commanding any sheriff of the State of Alabama, to seize and take into his possession, the said boat, her tackle, apparel and furniture, and the same in his possession, safely to keep, so as to be subject to the future decree of the court; but subject nevertheless, in the meantime, to be replevied out of his hands, upon bond or stipulation, with security being entered into in due form of law; and united with said warrant, let there be a clause, commanding that due monition be given to all persons whom it may concern, by attaching a copy of said process upon some conspicuous part of the boat, to be and appear at the next term of the County Court of Sumter county, to shew cause, if any they have or can, why the said boat should not be condemned, the said libel sustained, and the prayer of relief granted."

The warrant of seizure was issued and executed by the sheriff, taking into his possession the boat with her tackle, &c.; which was claimed by Alphonso Brooks, the master, who en-

tered into a stipulation upon replevying the boat, conditioned ; that "if said Brooks, the claimant of said boat, shall pay such judgment as shall be recovered and rendered on said libel, then this bond to be void, otherwise, in full force."

The cause being called for trial, the same was dismissed on motion, because it did not appear by the sheriff's return, that monition had been made as directed by the writ of seizure. From which decree, the libellant appealed to this Court.

REAVIS, for the plaintiff in error.

MURPHY & JONES, for the defendant.

COLLIER, C. J.—The monition required by the *fiat* of the Judge, was general, and addressed to all the world, so that all persons who were interested in resisting the lien upon the boat set up by the libel, might be advised of its pendency. Its object was not to protect the claimant and his co-stipulator from personal liability to the libellant's demand, but to prevent the boat from being subjected to its satisfaction, in despite of the paramount liens of others. (Dunlap's Ad. Prac. 133.) Now the lien of the libellant was discharged as soon as the claimant intervened and entered into the stipulation. (See 4th sec. of Act of 1824, Aikin's Digest, 390. Richardson, *et. al.* v. Cleaveland & Huggins, 5 Porter's Rep. 268; Livingston, *et. al.* v. steam-boat Tallapoosa, 9 Porter's Rep. 116.) This being the case, there was no conflicting lien in controversy ; no person was to be benefitted or prejudiced by making monition, as directed by the order of seizure. The Judge, had he thought proper, could have made his order conditional, directing monition to be made, only in the event, that no claimant intervened and entered into stipulation ; and having made it absolute in its terms, that cannot be made indispensable, which otherwise would be wholly immaterial.

The purpose to be effected by monition being superseded by the stipulation, the County Court erred in dismissing the libel ; consequently its decree is reversed, and the cause remanded.

FOSTER v. McDONALD.

1. When the holder of a bill of exchange and the party sought to be charged on it, reside in the same place, notice of the dishonor of the bill must be given him *personally*.
2. Where a bill is remitted to, or placed in the hands of a factor or agent, for presentment, for acceptance, or payment, the agent is not bound to give the party sought to be charged, notice of the dishonor of the bill, but may notify his principal of the fact, and a seasonable notice from him to such party, will be sufficient. But if the agent should give the necessary notice, it will be sufficient.

Error to Tuskaloosa County Court.

THIS was an action of assumpsit, by the defendant in error against the plaintiff in error, as indorsee of a bill of exchange.

The bill was dated, Tuskaloosa, 26th December, 1836, and drawn by Moses P. Walker, in favor of J. J. Foster, for twelve hundred and fifty dollars, on the 1st January, 1839, negotiable and payable at the Bank of the State of Alabama.

The bill though not drawn on, was accepted by G. Longmire, and endorsed by the defendant Robert J. Walker, and Dubose & Roff, which last indorsement was filled up to the order of E. F. Comegys, Esq. cashier.

At the maturity of the bill, it was presented by a notary public at the bank for payment, who, for default of payment, made protest and certifies, that "notices of protest were deposited in the post-office same day, for the drawer and first two indorsers, respectively, at this place." The defendant then proved, that before, and at the maturity of the bill, he resided at Tuskaloosa, the place of payment, and moved the court to charge the jury, that upon the evidence offered, the plaintiff is not entitled to a verdict, which the court refused; and further, that unless the jury were satisfied, from the evidence, that personal notice was given to the defendant, of the protest for non-payment of the bill, they must find for the defendant; which was refused; and the court charged the jury, that personal service of notice of the dishonor of the bill was not necessary to charge the defendant, except where the parties all resided in the same

city, and that the notice stated by the notary to have been given, was sufficient.

To the refusal to charge and to the charge given, the defendant excepted, and now assigns for error.

MARTIN & J. PORTER, for plaintiff in error.

PHELAN, contra.

ORMOND, J.—It is the settled law, that when the holder of a bill and the party sought to be charged on it as drawer or endorser, reside in the same place, notice must be given personally, of the dishonor of the bill. Stephenson v. Primrose, 8th Porter 155, and cases there cited. In this case, personal notice was not given to the indorser, of the dishonor of the bill, but he is sought to be charged on a notice, placed in the post-office at Tuskalooza, in which place he resided.

To ascertain then whether this notice was sufficient, we must inquire whether the holder resided in the same place; if he did, on the authority of the case just cited, the notice would not be sufficient.

The declaration alleges that the bill was endorsed to the plaintiff. The bill itself is set out in the bill of exceptions, taken on the trial, with its indorsements, but neither upon that, nor upon the bill, as recited in the protest, is the name of the plaintiff found, the last endorsement being filled up to the order of E. F. Comegys, cashier, by whose order, and as holder for the Bank of the State of Alabama, it is stated in the protest to have been protested for non-payment. The legal inference from this testimony is, that the bank was the holder of the bill at the time of the protest, and being, as we judicially know, located at the same place with the residence of the plaintiff in error, he was entitled, upon the dishonor of the bill, to a personal notice. The notice, therefore, which was given to him, by putting a letter in the post-office, directed to him, was not sufficient.

It must be presumed that the plaintiff became the holder of the bill, since its dishonor; but it would have been competent for him to prove that he was the holder of the bill before its maturity, and that the bank was merely his factor or agent. If such were the fact, and the holder did not reside in Tuska-

loosa, the notice of the non-payment of the bill might have been given through the post-office, to the holder, and a notice by him to the endorser, of the dishonor of the bill, by the next mail after his receipt of notice, would have been sufficient to charge him. It is true, a notice by the agent or notary, would have been sufficient to charge the plaintiff in error, if made in the mode which the law requires, but an agent or factor as such, is not required to do more, than to inform his principal of the dishonor of the bill.

Thus, in *Colt v. Noble*, 5 Mass. Rep. 167; where the holder of a bill drawn on London, lived in Madras, in the East Indies, and the indorser at Portsmouth, in the United States, it was held, that the agents of the holder in London, upon the dishonor of the bill, were not bound to give notice of the protest to the indorser, but might return the bill, with the protest, to the holder whose duty it would be to give seasonable notice to the indorser: See also to the same effect, *State Bank v. Ayres*, 2 Halstead, 130; *Haynes v. Birks*, 3 Bos. & Pul. 599; and *Tunno v. League*, 2 Johns. Cases, 1.

If however, it should hereafter appear, that from the residence of the holder at a distance from this place, notice of the dishonor of the bill could not have reached the plaintiff in error, as soon as the informal notice actually given by the notary, through the post-office, it might be a question whether the notice actually given, was not sufficient; but as that point is not presented on the record, we express no opinion upon it.

Let the judgment be reversed and the cause remanded.

SHACKLEFORD V. WARD.

1. Where money is wagered and deposited in the hands of a stake-holder, it may be arrested by either party before it is paid over, by a notice not to pay it. In such a case, however, a special demand would be necessary to enable him who gave the notice, to maintain an action for the sum deposited by him.
2. But if the stake-holder, after being so notified by one of the parties, pays the money to the other, he thereby waives the special demand, and may be sued as soon as the plaintiff elects to consider the wager as void; or as soon as it is ascertained that in point of fact, the wager was neither lost nor won.

Writ of error to the County Court of Sumter county.

ASSUMPSIT on the common money counts. Verdict for the defendant on the general issue, and judgment thereon.—The writ was issued on the third day of February, 1840.

At the trial, the plaintiff proved that some time in the year 1839, and previous to the election held in said county, he betted the sum of five hundred and fifty dollars, with one Tankersley, upon the result of the Senatorial election. The money was deposited in the hands of the defendant. On the day following the election, and before the defendant had paid over the money to Tankersley, the plaintiff gave notice to the defendant not to pay it over, as the election would be contested. The defendant replied that he would not. The plaintiff some weeks after this, was notified by the defendant, that he had paid the money to Tankersley, who would indemnify him for all losses. The election was subsequently, on the 28th day of January, 1840, declared insufficient to entitle the returned member to his seat in the Senate, and a new election directed to be had.

On this evidence, the plaintiff requested the court to charge the jury, if they believed the defendant, as stakeholder, had received five hundred and fifty dollars from the plaintiff, to abide the result of the said election for Senator, and the defendant had been notified by him not to pay over the money to the supposed winner, then he was entitled to recover of the defendant: The Court refused to give this charge, but instructed the jury that it was necessary for the plaintiff to prove an actual demand of the money before he could recover.

The plaintiff then requested the Court to charge the jury, that if the defendant had received notice from the plaintiff not to pay over the money, previous to paying it over, this was equivalent to a demand. This charge was refused.

The plaintiff further requested the Court to charge the jury, that if the plaintiff, when he notified the defendant not to pay over the money, had given him leave to keep it, subject to the final decision of the election, and the defendant, before such decision, had paid it over to the supposed winner, and had notified the plaintiff of this fact before the commencement of this suit, then these circumstances constituted a case in which no demand was necessary.

This, also, was refused, and the jury was instructed, that if the defendant was authorised to retain the money for a given time, and before the expiration of that time he had paid it over to the supposed winner, it was a circumstance which they might consider as determining the question, whether a demand was or was not made.

To all these charges as given, and refused to be given, the plaintiff excepted, and now assigns that the County Court erred in the several matters excepted to.

PECK, for the plaintiff in error.

JONES, contra.

GOLDTHWAITE, J.—1. The plaintiff in this case, after the supposed determination of the wager, gave notice to the stake-holder to retain the money in his hands, and not to pay it over to the supposed winner. This arrested the money in his hands, and it could at any time after this have been reclaimed by the plaintiff, and the defendant would not have been authorised to withhold it, even if the wager had been decided against the former. This was settled in the case of *Wood v. Duncan*. 9 Porter, 227. It appears, however, that the event on which the wager was to be determined, in point of law, never took place, for the bill of exceptions shows that the election was declared to be void, and a new one ordered. The consequence of this decision was, to remit the parties to this wager, to all their original rights to the monies severally deposited by them. If the money had then remained with the stake-holder,

a special demand would have been necessary to entitle the plaintiff to recover it.

2. No special demand, however, was necessary under the circumstances of this case. It appears that doubts had arisen with respect to the validity of the election, as declared in the first instance. The plaintiff informed the stake-holder that the election would be contested, and notified him not to pay the wager to the then supposed winner. Afterwards, and before the decision of the proper authority on the contested election, the stake-holder pays over the money to the supposed winner, and informs the plaintiff that he had done so, and that the then supposed winner would indemnify him for all losses. Certainly, after this, a demand was entirely unnecessary to enable the plaintiff to maintain his action, whether he elected to consider the wager as illegal and at an end; or whether he awaited the final decision, which in effect, decided that the wager was neither lost or won. The latter course was pursued, and this action was commenced in February, 1840, the decision having been made a few days previously.

The defendant, by his own act, in paying over the money, must be considered as waiving any right to a special demand. In the case of *Rathbun v. Ingalls*, 7 Wend. 320, it is said that an intention formed by an agent to retain money, and communicated to others, *but not to the plaintiff*, would not dispense with a demand. But it is admitted in that case, if the intention had been communicated to the plaintiff, it would have waived the demand.

The County Court erred in instructing the jury that the plaintiff could not recover without proof of a special demand of the money.

Let the judgment be reversed, and the case remanded.

FITZPATRICK, *et. al.* v. FEATHERSTONE AND McDOUGALD.

1. Chancery will not enforce the specific performance of a contract for the sale of lands, where it appears from the allegations of the bill, that the vendor has no title; for such a decree would be to compel the performance of an unlawful act.
2. A contract for the purchase of land, will not be rescinded, where the purchaser, does not offer to return the land to the vendor, ; and a bill which alleges the inability of the vendor to make title, but declares the willingness of the vendee to pay the purchase money, upon receiving a complete title, does not authorise a decree to rescind the contract.
3. Where a bill is filed to obtain an injunction, and dismissed generally, such a decree will not bar an original bill for relief, in which other questions shall be presented.

This cause comes here by writ of error, from the Chancery Court sitting at Montgomery.

THE plaintiffs allege in their bill, that in the year 1836, they contracted with the defendant, Featherstone, for the purchase of several tracts of land, situate in the county of Macon, at the price of eleven thousand dollars—one half of this sum was to have been paid sixty days after the purchase, and the balance in twelve months. The sum first due has been paid, and for the payment of the last sum, they executed their promissory note, payable twelve months after date.

The lands agreed to be sold, it appears, were reservations of Creek Indians, under the treaty of 1832, and the vendor represented to the plaintiffs "that he possessed the approved contracts" therefor; and in a bond which he executed to the plaintiffs, covenanted to obtain patents for the lands by the first day of January, 1839, and to make titles to them for the same, as soon as patents should issue "from the government of the United States."

It is further stated, that the plaintiffs have never been in the *actual* possession of the lands in question; that Featherstone "never did possess the approved contracts for the same," and now resides without the limits of the State, and is of very doubtful solvency.

The complainants allege, that Featherstone made fraudulent representations to them touching his title to the lands, and a fraudulent combination between himself and co-defendant, by which McDougald became assignee of their second note, and has prosecuted a suit thereupon to judgment against them in the Circuit Court of Macon.

The complainants declare their readiness and willingness, and offer to pay the judgment recovered by McDougald, whenever their vendor shall make them titles pursuant to the condition of his bond.

It is prayed that execution upon the judgment may be enjoined, and that the defendants may answer; "and that your orators may have such other and further relief in the premises as to your honor shall seem meet, and the nature and circumstances of the case may require."

The defendants answered severally, very fully, denying all fraud and combination, wherewith they are respectively charged; and the defendant, Featherstone, avers, that he had approved contracts for the several tracts of land, and if patents had not been issued by the government for the same, they would issue as a matter of course. That he is willing to make the necessary titles to the complainants, and demurs to their bill because it is not alleged therein that a deed was ever presented to him for his execution.

The chancellor dissolved the injunction and dismissed the bill, because the answers denied all the material allegations, and there was no prayer for "relief beyond the injunction."—The dismissal of the bill is now assigned for error.

HARRIS, for the plaintiffs in error.

BASCOM, for the defendants.

COLLIER, C. J.—It is not insisted that the injunction was improperly dissolved, nor indeed can it be, as the answers contain a direct denial of the allegations of the bill on which the complainants rest their claim to equitable relief.

Though it does not explicitly appear whether the bill was dismissed upon a hearing of the cause, or on a motion to dissolve the injunction, yet we will suppose, that it was disposed of on the motion to dissolve. The question then is, do the facts

as stated by the complainants, and the general prayer of the bill, entitle them to further relief?

The only relief which the plaintiffs could claim upon a contract such as that shown by the record, beyond the injunction, is either a specific performance, or a rescission of the contract. But they do not seek either of these, and the premises do not authorise a decree either for the one or the other. It is charged that Featherstone has not, nor even had at the time of the sale to the plaintiffs, the approved contracts for the lands in question. Assuming this to be true, as against the plaintiffs, and chancery would not decree a specific performance. The interference of Courts of Equity in such cases is discretionary, and a specific performance will not be enforced where it is obvious that the vendor has no title—such a decree would compel the party to an unlawful act. 2 Story's Eq. 52-3, 79, 80-1.

In order to rescind a contract, the parties must be placed *in statu quo*, that is, the one party must have the property, with which he parted, and the other the money. The plaintiffs do not offer to relinquish their claim to the lands purchased, nor do they ask a return of the money, with which they parted; but they declare their willingness and readiness to pay the judgment recovered against them. There is nothing in all this, which shows a wish to be relieved from their contract, but it manifests an anxiety that titles should be made to them by their vendor, that they may with safety to their interest, satisfy the judgment against them.

Upon neither of the grounds examined, are the plaintiffs *entitled to relief on their bill as framed*, and it was therefore properly dismissed. It is no objection that the dismissal was general, instead of without prejudice, as it will not bar an original bill for relief, in which other questions shall be presented, than those litigated in the present case.

The contract between the parties appears to have been made in Georgia, and the note on which the judgment was recovered, is there dated; as it does not contemplate payment elsewhere, the *lex loci contractus* must determine its legal effect. And even if it be doubtful whether the laws of this State are the rule of decision, if McDougald became the proprietor of the note here, there can be no doubt, but the laws of Georgia are conclusive of his rights, if the indorsement was made there.

What are the laws of that State, it is unnecessary (from the view taken) to inquire.

The fact that the plaintiffs are not, nor ever have been in the *actual possession* of the lands, is every way immaterial. They doubtless have the constructive possession, "which is transferred to the vendee *eo instanti*, with the execution of the conveyance, by the statute of uses." Bliss, adm'r. v. Yancey, (1 Ala. Rep. N. S. 273.)

We have only to add that the decree is affirmed with costs.

BURROUGHS v. WRIGHT.

1. An appearance by the defendant in a suit, commenced by attachment, will have the same effect as a waiver, as it would have in a suit commenced in the usual mode.

Error to the County Court of Tuskaloosa.

THIS was an action commenced by attachment, by the defendant in error against the plaintiff in error, on a promissory note. Two persons who were summoned as garnishees, denied by their answers, that they were indebted to, or had effects of the defendant in their hands.

At the trial term, a judgment was rendered against the defendant below in these words: "came the parties by their attorneys, and the defendant saying nothing in bar or preclusion of the plaintiff's action, it is therefore considered by the court," &c.

From this judgment the defendant prosecutes this writ of error, and assigns for error, the rendition of judgment by default.

PECK & LINCOLN CLARK, for the plaintiff in error.

J. L. MARTIN, contra.

ORMOND, J.—That the appearance of a defendant will

dispense with service of process, is not denied, but the argument of the counsel for the plaintiff in error is, that there is a distinction between the case of a suit commenced by writ in the ordinary mode, and one commenced by process of attachment, as is the case here. We can perceive no difference between the cases. The object of the attachment is to compel an appearance, by a levy on the property of the defendant; and he certainly may do that voluntarily, which it was the object of the process to accomplish in another mode. That he did appear and waive making any defence to the action, is shown by the record. Some remarks were made at the bar, about the manner in which the clerks make up the minutes; so far as these remarks were designed to impugn the veracity of the record, they can have no weight. The fact that the *parties appeared by their attornies*, is established by the same testimony as the rendition of the judgment, and one may be questioned with the same propriety as the other.

Let the judgment be affirmed.

STARKE V. MARSHALL & CAMMACK.

1. The 25th day of December, is not *dies non juridicus*, nor will a writ of error be quashed, because it was issued on that day.
2. The affidavit for an attachment need not declare the manner in which the debt sworn to, accrued.
3. Under the attachment act of 1833, Aikin's Digest, 37, the writ could only be executed in the county to which it was returnable, otherwise, under the act of 1837. P. P. 65 sec. 12.

Writ of Error to the Circuit Court of Mobile county.

THE action was commenced by attachment, which was issued by a Justice of the Peace, of Mobile county, on the 14th April, 1837, and was returnable to the Circuit Court.

The affidavit on which it is founded, sets forth that one of the plaintiffs made oath, that the defendant was indebted to

them in the sum of fourteen hundred dollars; but it omits to state how the indebtedness accrued.

The attachment was levied by B. W. Bell, who adds to his name, in the return, sheriff M. C.; and it further appears from a delivery bond, executed by the defendant, that the property levied on, was delivered to him on the execution of the bond, which is payable to Bushrod W. Bell, as sheriff of Montgomery county. A judgment by default was rendered on the 27th December, 1837, but no declaration is found on the record.

The writ of error is tested on the 25th day of December, 1840, and is prosecuted by the defendant, who assigns as error,

1. That the Circuit Court of Mobile county had no jurisdiction of the cause of action; and the writ was improperly issued in, and from that county.

2. That the Circuit Court erred in rendering judgment by default, when there was no declaration.

3. Because the plaintiffs did not entitle themselves to an attachment, they not having complied with the requisites of the statute.

STEWART, for the plaintiffs in error, insisted that the attachment which issued in Mobile, could not be properly levied by the sheriff of Montgomery county. The omission to file a declaration is fatal, but here the case need not be remanded because the affidavit does not disclose how the defendant became indebted to the plaintiffs.

CAMPBELL, contra, moved to dismiss the writ of error, it having issued on Christmas day, which he insisted was a *dies non juridicus*.

GOLDTHWAITE, J.—1. The motion to quash the writ of error, cannot prevail.

It may be, and doubtless is true, that in England, Christmas is considered as a *dies non juridicus*, but the same rule, has never, so far as we are informed, been applied in this country; and the reason is, that we have only adopted the common law, so far as it is applicable to our institutions. The day of the nativity of our Saviour, is certainly unknown, and the adoption of the 25th of December, for the purpose of celebrating certain

observances in England, is derived from the ritual of the Catholic Church. The Sabbath, is the only day, which our laws and statutes recognise, as so peculiarly holy, as to make any secular business unlawful.

2. The act of 1833, Aikin's Digest, 37, under which this attachment was sued out, does not require the plaintiff to shew, in his affidavit, how, or by what means the debt accrued; it is sufficient that the amount of the debt should be sworn to. The objection, therefore, to the affidavit, cannot avail the plaintiff in error.

3. The attachment was irregularly directed to any sheriff of the State, because, at the time this writ issued, such a direction was not permitted by the statute; but this would be a mere informality, not sufficient to avoid the writ, if in point of fact, it had been executed by the proper officer. This, however, was not the case, for instead of being executed by the sheriff of Mobile, it was levied by the sheriff of Montgomery county, and this raises the question, whether, under the act of 1833, process of attachment, could properly run into more counties than one. The statute permits the Judge or Justice, to grant an attachment against the estate of the debtor, *wherever it may be found*, and certainly in many cases it would have been a very inefficient remedy, if it could only have been levied on property within the county to which it was returnable. My own opinion is, that a construction should, from the first, have been given to this act, so as to allow of levies on the property of the defendant, wherever it might be found; but a majority of the court think otherwise; and we all concur that the subsequent act of 1837, (P. 65, sec. 12,) which amend and consolidate all the laws relating to attachments, and which authorises branch writs to as many counties as may be desired, must be considered as a legislative exposition of the act of 1833. It follows from this, that under that act no attachment could be levied in a different county from that which it was returnable.

The omission of the declaration need not be examined, as this was error, according to repeated decrees of this court.

Let the judgment be reversed.

DOE, ex dem. POLLARD'S HEIRS V. FILES.

1. All grants of any portion of the lands ceded to the United States by the Treaty of Paris of 1803, subsequently to the Treaty of St. Ildefonso, of 1800, excepting such as were made to actual settlers, previous to the 20th of December of 1803, are null and void.
2. Congress does not possess the constitutional power to grant the shore of the navigable waters within this State; and the fact that the grantee had an inoperative Spanish grant for the same, cannot legalize the act of Congress.
3. A patent for lands, the invalidity of which appears by inspection, will not authorize a recovery, and it is unnecessary to resort to Equity, to waive it.

THIS was an action of ejectment in the Circuit Court of Mobile, at the suit of the plaintiffs against the defendant, for the recovery of "a messuage or lot of land," situate in the city of Mobile.

The defendant being admitted to defend the action, instead of the tenant in possession, confessed lease, entry and ouster, and relying on the title only, pleaded "not guilty." He also, according to the statute, in such case provided, suggested, that since the 8th January, 1836, he had made improvements on the premises in controversy, of the value of ten thousand dollars; under the belief that his title to the same was valid. Thereupon the cause was submitted to the jury.

On the trial, a bill of exceptions was sealed at the instance of the plaintiffs. To maintain the issue on their part, the plaintiffs read to the jury, the act of Congress of the 26th of May, 1824, "granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city," and the act of the 2d July, 1836, entitled "An act for the relief of Wm. Pollard's heirs," as also a patent, which had issued in pursuance of the latter act, for the premises in question.

They also gave in evidence a grant of the land in dispute by Cayetano Perez, as commandant of Mobile, on the 12th December, 1809; proved the genuineness of Perez' signature, and referred to the state papers relating to the public lands, to show the different periods during which he was in command.

It was further shown, that the lot in controversy, was situa-

ted between Church and North boundary streets ; lies east of Water street, in front of lots known under the Spanish government, as water lots, was itself in 1824, a water lot,—and during the time of the Spanish government, the tide flowed over it.

The defendant, in order to make out his defence, gave in evidence, a Spanish grant, made the 9th of June, 1802, to Pantton, Lesley & Co., for the lot directly west of that in dispute, and on the opposite side of Water street. This grant was confirmed to John Forbes & Co., as the successors of the grantees, on the 8th January, 1820.

The land east of Water street, was below ordinary high water mark, in 1813, and Water street, was not laid off until 1820 or '21.

John Forbes & Co., entered upon the land granted them ; fulfilled the conditions of the grant ; made valuable improvements thereon, and held undisputed possession of it on the 26th May, 1824.

Curtis Lewis, made the first improvement on the lot east of Water street, except a canal and improvements along it, which were made by John Forbes & Co. It was however, in evidence, that the servants of Wm. Pollard were seen removing some drift wood, and piling some lumber upon it in 1811.

The defendant connected himself with the title of Curtis Lewis, John Forbes & Co., and the corporation of the city of Mobile, which claimed the lot in dispute, under the act of the 26th May, 1824.

Evidenoe was adduced to show. that the date of the grant to Pollard, had been altered from 1810, to 1809; and the plaintiffs then proved that Cayetano Perez, was commandant of Mobile, in 1810.

The defendant also proved, that he had made improvements on the lot in question, to the value of seven thousand dollars, since the 8th January 1836.

Other facts are shown by the bill of exceptions, but as it is not necessary to state them, in order to raise the questions of law examined by the court, they need not be here noticed.

The plaintiffs counsel moved the court to instruct the jury,
1st. That the Spanish grant to William Pollard, was ratified and confirmed by the 8th Art. of the treaty of amity, settlement and limits between the United States and his Catholic

Majesty, dated the 22d February, 1819, which charge the court refused to give.

2d. That the act of Congress of the 26th May, 1836, confirmed the Spanish grant to Pollard; which charge the court refused to give; but charged the jury, if they believed the evidence to be true, the fee-simple to the premises in dispute, vested in Forbes & Co., and the acts of Congress of 1824 and 1836, and the patent issued in pursuance thereof, were utterly void, so far as relates to the subject in controversy, and the lessors of the plaintiffs derived no title from those sources.

3d. If they should find that an alteration had been made in the grant to Pollard, advantage could not be taken of it in an action of ejectment, but by a *scire facias*, in the name of the United States, or by a bill in equity; which charge the court refused to give; but charged the jury, that if they should believe that the date had been altered, then they should find for the defendant; unless they were satisfied from the evidence, that the alteration was made while Perez was commandant. But if the grant was altered, the law would not presume that it was issued while Perez was commandant: this fact must be shown by proof.

4th. That the act of the legislature of Alabama of January 8th, 1836, "for the relief of tenants in possession, against dormant titles," is contrary to the 10th section of the 1st article of the constitution of the United States, and is therefore void; which charge the court refused to give; but instructed the jury that the statute was constitutional.

To the refusals to instruct as prayed, as well as to the instructions given to the jury, the plaintiffs excepted; and a verdict being found for the defendant, and a judgment thereon rendered, they have prosecuted a writ of error to this court.

TEST, for plaintiffs in error.

STEWART and CAMPBELL, for the defendant.

COLLIER, C. J.—1. The question, whether the 8th article of the treaty of amity, settlement and limits, concluded between the United States and the King of Spain, on the 22d February 1819, ratifies and confirms all the grants of land, made before the 24th January 1818, by his Catholic Majesty, or by his law-

ful authority, in the territories ceded by His Majesty to the United States, is no longer an open question. The case of *Foster and Elam v. Neilson*, (2 Peters Rep. 254,) expressly decides, that all grants made by the Spanish authorities, of any portion of the lands ceded to the United States, by the treaty of Paris, of 1803, subsequently to the treaty of St Ildefonso, of 1800, excepting such as were made to actual settlers, previous to the 20th of December of 1803, are null and void. That case is confirmed by *Garcia v. Lee*, 12 Peters Rep. 511, and by the still later decision of (*Keene v. Whitaker, et al.* 14 Peters Rep. 170. See also, *Innerarity v. Byrne*; 8 Porter's Rep. 176, and the heirs of *Pollard v. Kibbe*, 9 Porter's Rep. 712. That the land in this State, south of thirty-one degrees north, is embraced by the treaty of 1803, has been repeatedly affirmed by every department of the federal government.

2. If the law as laid down by a majority of the court, in the lessee of *Pollard's heirs v. Kibbe*, (14 Peters Rep. 353,) is to be regarded as decisive of the law applicable to the plaintiffs title, and as excluding all objection to it, then the answer given by the Circuit Court, to the second charge prayed, is confessedly erroneous. Of the authority of that case, we have nothing to say. We may however, be permitted to remark, with all deference, that we should yield to it more willingly, if it had the sanction of a majority of the Supreme Court. We are aware, that as reported, the judgment seems to have been concurred in by five of the Justices; but we have in our possession a manuscript copy of the opinions of Justices Thompson, McLean, Barbour and Catron, and the judgment that was rendered, at the foot of which, is the following memorandum: "dissenting Justices—Catron, Barbour and Wayne; Mr Chief Justice Taney, did not sit in this case," attested as follows: "true copy, test Wm. Thos. Carroll, C. S. C. U. S." That Mr. Justice McKimley, was absent during the entire term, appears from a note of the Reporter. If the attestation of the clerk be correct, then but four of the Justices concurred in reversing the judgment of this court. And to all this it may be added, that Mr Justice McLean did not agree to the judgment of reversal, so far as we are informed by his opinion, upon the ground that the grant to William Pollard, in 1809, was a "new grant" within the meaning of the act of the 26th of May, 1824. But he yielded

his assent to the conclusion of Mr. Justice Thompson (as we understand it,) because the second section of that statute, required the improvement to be made on the lot east of Water street, and to entitle the proprietor of the lot immediately west to the improved water lot, the improvement should have been made by himself. These are questions, which it seems to us, were wholly unimportant to be considered, unless Pollard's was a "new grant," since it is an undisputed principle, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's.

We have taken this view of the case referred to, with the most profound respect for the Supreme Court of the United States, and have only to say, that we hope an opportunity may soon be afforded for a re-examination of the act of 1824.

Conceding however, to the lessee of Pollard's heirs v. Kibbe, all weight that may be claimed for it, and still the answer of the Circuit Court to the second prayer, is not objectionable on error. The water lots of 1824, were a part of the shore of Mobile bay, over which the tide flowed, and must consequently be regarded as a portion of the navigable waters of this State. Among the propositions submitted by Congress to the convention which formed our constitution, for its acceptance or rejection, it is declared, that "all navigable waters within the said State, shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost or toll therefor imposed by the State." By the ordinance which makes a part of the constitution, the convention accepted the propositions submitted. Now here is a clear dedication to the public use of the navigable waters within the State, and an implied inhibition upon the power of Congress to grant the shore. Other arguments quite as cogent might be urged against the exercise of such a power, but we will content ourselves with a reference to the *Mayor, &c. v. Eslava*; (9 Porter's Rep. 577,) in which the question is largely considered.

The fact that the ancestor of the plaintiffs had a grant from the Spanish authorities for a part of the shore, can make no difference. The stipulation between the federal government and the State, placed it beyond the power of the former to bestow its bounty by confirming that grant, which we have seen was void,

If the acts of 1824 and 1836, do not operate so as to invest the plaintiffs with a title, it is clear that the patent, which upon *its face*, professes to be issued under the authority of the latter act, is merely *void*. The circumstances under which the patent emanated, are shown by an inspection of the document itself, and the powers of a court of law, are as competent to declare its invalidity, as a court of equity can be, in any form of proceeding. Indeed, it would be an anomaly in judicial proceedings, for a court of law to sustain an instrument void on its face, upon the ground that chancery should be resorted to, in order to vacate it. The Supreme Court U. S. in *Bagnell v. Broderick*, (13 Peters Rep. 436,) pushed the law on this point to its utmost limits. But that case is clearly distinguishable from the one before us. In that case, the court held, that in an action at law, a patent from the United States for a part of the public lands, is conclusive, and the party claiming adversely, will be forced into equity, to show that it issued by mistake. There, the patent was in legal form, and apparently issued to the person entitled to the land conveyed, so that it was necessary to establish its irregularity by extrinsic proof: and in that it differed essentially from the patent offered in evidence in the present case. There are also other points of difference, which will be readily perceived by a comparison of the cases. *Ross v. Doe, dem. Borland. et al.* 1 Peters Rep. 655.

3 and 4. Even conceding that the third and fourth prayers for instructions were strictly in conformity to law, and the charge given in answer to the third prayer, was directly opposed to it, yet in all this, there is no available error. The giving or refusing the charges, could not benefit or injure the plaintiffs. If our view of the acts of 1824 and 1836, is correct, the plaintiffs could not recover, and the court having so instructed the jury, the plaintiffs cannot complain, that they have been prejudiced by the giving, or withholding any other instructions.

Without attempting to add any thing further, the judgment of the Circuit Court is affirmed.

COOK, ADM'R. v. FIELD, et. al.

1. It is no defence to a suit on a note, that one of the defendants had been garnisheed by a creditor of the payee, and judgment obtained against him, without proving, also, that the judgment had been satisfied.
2. Such proof may be made in the action of assumpsit under the general issue.

Error to the County Court of Mobile county.

THIS was an action of assumpsit commenced by F. C. Ellis, the intestate of the plaintiff in error, in the County Court of Mobile, on the 5th February, 1840, as the assignee of one S. C. Fisher, on a note made to him for one thousand dollars, by the defendants in error, and one A. Henderson, as to whom the suit was discontinued.

To a declaration in the usual form, the defendants pleaded, that at the April term, 1839, of the Circuit Court of the United States for the Southern District of Alabama, a certain firm, using the name and style of Cook & Townsend, recovered of one John Ellis and Samuel C. Fisher, a judgment for twenty-one hundred and ninety-two dollars, besides costs of suit; that the execution which issued thereon, being returned *nulla bona*, and a suggestion made that Stephen G. Field was indebted to the said defendants, he was summoned as garnishee to appear before the said Circuit Court on the fourth Monday of November, 1839, to answer, &c.; that the garnishment was served on him the 7th of May, 1839; that he submitted himself to the judgment of the Court, and that at the November term, 1840, of the Court, Cook & Townsend, by the judgment of the Court, recovered against him as such garnishee, the sum of twenty-one hundred and ninety-two dollars, besides costs.

The defendants, also, pleaded *non assumpsit*. Issue was taken on the first plea, of *nul tiel record*, and as appears from the record, the cause was submitted to a jury, who found for the defendants.

From a bill of exceptions taken in the cause by the plaintiff, it appears that the defendants, to maintain the issues, offered in evidence the record of the judgment of the Circuit Court of

the United States, and introduced parol evidence to show that the judgment specified in the record was for the debt sued for in this action; to which evidence under the issue joined, the plaintiff objected; which objection the Court overruled, and permitted the same to go the jury, and the plaintiff excepted: whereupon, the Court charged the jury, that if they were satisfied from the evidence that there was a judgment against the defendant Field, for the debt, that they must find a verdict for the defendants. The plaintiff then requested the Court to charge the jury, that as the action was by statute joint and several, they could under the circumstances of this case, find a verdict for the defendant Field, and against the defendant Marstead; which charge the Court refused to give, and charged the jury that the verdict must be a general verdict, either for the plaintiff or the defendants; to which the plaintiff also excepted. To revise the judgment of the Court below, the plaintiff brings this cause here, and now assigns for error,

1. That the issue of *nul tiel record* was not disposed of by the Court.
2. The matters of law arising out of the bill of exceptions.

HALE, for plaintiff in error, cited 2 Starkie's Ev. 78; Salmon v. Smith, 1 Saunders' Rep. 207, note 2; 1 Peters' Rep. 73; 1 Wilson's Rep. 89; 13 Mass. Rep. 148.

B. F. PORTER, contra, cited 13 Peters' Rep. 151; 8 Cowen, 1; 3 Stark. Ev. 1282; 1 Saund. 67, note; 3 Burrows, 1353; 1 Chitty, 473; 1 Phil. Ev. 224; 16 Johns. Rep. 136; 3 Cowen, 374; 5 Wendell, 161; 7 Porter, 128; 1 Ala. Rep. N. S. 108.

ORMOND, J.—A recovery of the debt sued for by a previous garnishment, may be either pleaded specially, or given in evidence under the general issue, in an action of *assumpsit*; it is unnecessary, therefore, to consider in this case whether the objection, that the Court, and not the jury, should have tried the issue under the plea of *nul tiel record*, is well taken, as the matter was submitted to the jury under the plea of *non assumpsit*.

The defendants having produced the record of the judgment against Field, one of the defendants, who had been summoned as a garnishee, at the instance of a judgment creditor of the assignor of the plaintiffs' intestate, and proved that it was for the

same debt now sued on, the Court charged the jury that if they were satisfied from the evidence that there was a judgment against the defendant, Field, for the debt sued on, they must find a verdict for the defendants; to which the plaintiff excepted, and had previously objected to the evidence going to the jury. It becomes, therefore, necessary to consider whether the record offered, and the accompanying parol evidence, were sufficient to authorise a recovery for the defendants.

The judgment against the garnishee was rendered *nisi*, for failing to appear in obedience to the process; and afterwards, upon the return of a *scire facias*, made final: it does not therefore appear from the record, that the judgment against the garnishee was for the same debt sought to be recovered in this action. There can be no doubt that it was competent for the defendants, by parol proof, to identify the debt recovered by the judgment against the garnishee, and show that it was founded on the same indebtedness attempted to be enforced in this suit.

It does not appear from the record of the garnishment, that an execution had issued upon the judgment against the garnishee, or that there was any proof to that effect, or that the judgment was satisfied. That the judgment against the garnishee *unexecuted*, will not protect the garnishee when sued by his creditor for the same debt, is clear, both on principle and authority; for if an unexecuted judgment against the garnishee would be a bar to a suit against him by the original creditor, it might happen that he would not be compelled to pay the debt at all, as the judgment of the attaching creditor might never be enforced.

In the case of Robertson and wife v. Norroy, (1 Dyer, 83, a.) the custom of London was certified by the recorder to be, "that if a man sue another before the Mayor, &c. and a third person is indebted to the plaintiff, in as much as the suit of the plaintiff is for, and by the custom of the law of attachment, the third person is condemned, and judgment given against him; notwithstanding the judgment, if no execution be sued out against the third person, the plaintiff may resort back to have judgment and execution against the defendant, who is his principal debtor, and he may also sue the third person for his debt, notwithstanding the judgment unexecuted," &c. In Turbill's case,

(1 Saunders' Rep.) 67. the custom was certified by the recorder, who describes the manner of summoning one as garnishee, &c. and concludes by saying, "and judgment shall be, that the plaintiff shall have judgment against him (the garnishee) and that he shall be quit against the other (the original creditor) *after execution sued out by the plaintiff.*" To the same effect, and nearly in the same language, the law is laid down in Bacon's Ab. 2 vol. 262, title, Customs of London.

From these authorities, it appears very clear, that the plaintiff in attachment, by the custom of London, may after obtaining judgment against the garnishee, omit to sue out execution, and proceed against the original debtor, in which event the defendant in attachment may proceed against the garnishee for his debt, and the *unexecuted* judgment will be no bar to his recovery. The *suing out execution* against the garnishee, is in effect, an election to take him for the debt of the original debtor, and operates an extinguishment of the debt. The custom of London is the original of our statutory proceedings by attachment, with some slight modifications—one of which is, the plaintiff in attachment cannot have judgment against the garnishee until he obtains judgment against the defendant in attachment; whereas, by the custom of London, the plaintiff by making oath to his debt, and giving pledges to return the money in a year and a day, if the defendant disproved the debt, obtained judgment against the garnishee.

As, therefore, by our attachment laid, the plaintiff obtains a judgment against the defendant in attachment, as well as against the garnishee, on both of which he may have execution, it will follow that the mere suing out an execution against the garnishee, will not, in this State, as in England, by the custom of London, be evidence of an election to substitute the garnishee as his debtor, instead of the defendant in attachment; and it will necessarily follow, that nothing but a *satisfaction* of the judgment against the garnishee, will absolve him from liability when sued for the debt by the original creditor. The Court, therefore, erred, in stating that the rendition of judgment alone would have that effect.

The defence set up that the debt was paid by the garnishment of one of the defendants, would, if properly made out, be a defence to all. The statute, which declares that all joint

contracts shall be considered as joint and several, does not affect this question. Although, by virtue of that statute, each of the makers of a note or bond may be sued separately, and several judgments obtained, there can be but one satisfaction, so a payment by one would be a payment for all, and the defence here set up, is nothing less than a compulsory payment of the debt by one of the defendants, which must inure to the benefit of all.

Let the judgment be reversed, and the cause remanded.

REYNOLDS V. BELL.

1. A motion to quash or set aside process, is always addressed to the discretion of the Court, and though such a motion may be entertained, yet its refusal cannot be examined on error. This Court will not examine the refusal of an inferior Court to quash an attachment.
2. When the suit is commenced by attachment, it is unnecessary to carry into the declaration any of the recitals contained in the bond and affidavit, as these have no connexion with the cause of action.

Writ of error to the Circuit Court of Dallas county.

THIS action was commenced by attachment, sued out by Sackfield Brewer, as the agent of the plaintiff. The affidavit made by the agent states, that the plaintiff is a citizen of this State; in other respects it is in strict conformity with the statute, except that at the close it omits the word defendant—thus—and that an attachment is not sued out for the purpose of vexing or harrassing the said ———.

The bond is executed by Brewer in his own name, and recites that the attachment was sued out at his suit “as the agent of Bell, and is conditioned; that the said Brewer, agent as aforesaid, shall prosecute his suit with effect, or in case he fail therein, shall well and truly pay and satisfy to the said States Reynolds, all such costs and damages as shall be recovered against the said Brewer, agent as aforesaid, his heirs, &c. in any suit

or suits which may hereafter be brought, for wrongfully and vexatiously suing out said attachment; and shall pay the said Reynolds all such costs and damages as he may sustain by the wrongfully suing out an attachment."

The bond omits in its caption to state the name of any county, but the recitals show that the attachment was returnable to the Circuit Court of Dallas county.

At the return term, a motion was submitted by one as *amicus curiæ*, to quash the attachment, because the affidavit and bond were defective. This motion was overruled.

The defendant then appeared and pleaded in abatement that the attachment is variant from the declaration, because the plaintiff is described in the former as being a resident of this State, which description is omitted in the latter; and also, because the name of the agent is altogether omitted in the declaration, and the suit is prosecuted in the name of John Bell, when it should, to accord with the attachment, be in the name of Sackfield Brewer. The plaintiff demurred to this plea, and had judgment, that the defendant answer over, which he declining to do, judgment was rendered against him.

He now prosecutes this writ of error, and assigns,

1. That the affidavit for the attachment is insufficient.
2. That the Circuit Court erred in refusing to quash the attachment.
3. That the Circuit Court erred in sustaining the demurrer to the plea in abatement.

BOLLING, for the plaintiff in error.

EDWARDS, contra.

GOLDTHWAITE, J.—1. The conclusion to which we have arrived, renders it unnecessary to examine, in this case, into the sufficiency of either the bond or affidavit.

A motion to quash or to set aside proceedings, in the nature of process, is always addressed to the discretion of the Court, and may be acted on or declined at pleasure, and we are not aware that it has ever been held error to refuse to entertain the motion. It is true, when the judgment of a Court has been had in this summary mode, we have uniformly held that its correctness might be examined on error. Planters and Merchants

Bank v. Andrews, 8 Porter, 404. But we do not consider it to be so when the Court merely refuses to entertain the motion.— There may be many reason which might influence a Court to refuse to quash, and we apprehend it is always competent to put the party to his plea or demurrer.

The third section of the act of 1833, which yet remains in force, seems to indicate that the omission of the bond or affidavit must be taken advantage of in this way; and a defective bond or affidavit, can of course, be reached in the same manner.

We are satisfied that we cannot review the decision of an inferior Court, on a motion refusing to quash process, when the same matter could be more regularly presented by plea in abatement.

2. The plea in abatement which was filed subsequently to the refusal to quash, does not bring to our view any defects in the bond or affidavit; it merely asserts that a variance exists between the declaration and the previous proceedings. We think it very clear that it was unnecessary to carry the recitals of the bond and affidavit into the declaration, because they have no connexion with the cause of action.

If, however, it was intended by this plea to assert that the attachment was sued out in the name of Brewer, and that he should have declared instead of Bell, the plea cannot be sustained; because all the proceedings sufficiently show, that the former acted as the mere agent of the latter, in whose name all the proceedings are intitled. The Circuit Court, therefore, very properly sustained the demurrer to the pleas.

There is no error in the record, and the judgment is affirmed.

HARDING v. MERRICK & WASHINGTON.

1. Where a commission to take a deposition, directed the commissioners to take the deposition on a certain day, and continue from day to day, until completed, the commissioners are not authorised to meet on the day designated, and adjourn to one more remote than that next succeeding.

Writ of error to the Circuit Court of Mobile.

STEWART, for the plaintiff in error.

CAMPBELL, for the defendants.

COLLIER, C. J.—This cause comes here by writ of error, from the Circuit Court of Mobile. In the record there is a bill of exceptions taken at the instance of the plaintiff in error, which presents several questions of law. But the parties have only requested our opinion upon the question, whether the deposition of Richard Thomas, taken in the State of Maryland, was admissible.

The commission directed the commissioners to take the deposition of the witness on the 6th of October, 1838, and to continue from day to day until completed. The commissioners and witness met on the 6th and adjourned to the 27th October.

The commissioners should, if the deposition could not have been taken on the 6th of October, have adjourned from day to day, and not to the 27th. This point was, in effect, decided in *Ulmer v. Austill*, 9 Porter's Rep. 157, and is expressly determined in *Buddicum v. Kirk*, 3 Cranch's Rep. 293.

The judgment of the Circuit Court is reversed, and the cause remanded.

WOODS V. McCANN AND WITHERSPOON, ADM'RS.

- I. An executor or administrator may report an estate insolvent when the *personal* property is insufficient to pay all the debts; and the effect of such representation, duly certified from the County Court, will be to abate all suits then pending.

Error to the County Court of Greene.

THIS action was commenced by the plaintiff in error as endorsee of a bill of exchange against Hugh McCann, as drawer. Pending the action, the defendant died, and the suit was revived against the defendants in error, as his administrators.

To prevent the further prosecution of the suit, the defendants pleaded that they had reported the estate of their intestate insolvent, to the Judge of the County Court, and that the report and representation was by him allowed, and ordered to be recorded. To which plea the plaintiff replied *nul tiel record*. This issue being found for the defendants, judgment was rendered by the Court, that the suit abate.

On trial of the issue, a bill of exceptions was taken, which discloses, that to maintain the issue on their part, the defendants offered a record of the County Court, showing the report made by the defendants of the insolvency of the deceased, and the action of the County Court thereon. The report is an exhibit of the amount of claims in suit, particularly set forth, amounting to,

Claims in suit,	:	:	:	:	\$18,406 94
Claims not in suit,	:	:	:	:	15,699 81
Debts paid, not included in the foregoing statement,					16,000 00

\$50,106 75

Then follows a statement of the personal assets,

amounting to	:	:	:	:	33,188 03
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Amount of debts beyond personal estate, \$16,918 72

"The administrators beg leave to state that most of the larger debts mentioned in the foregoing schedule, were not presented to them, and they had no certain knowledge of their exis-

tence until some time in the present year, as will appear by the indorsement, showing when they were presented, and after they had commenced a crop, and hence they did not apply for the sale of the personal property, until they had by the great number of suits and claims, found that the sale of the whole personal property would not be sufficient to meet the claims, in addition to the land, which had previously been ordered for sale by Judge Street. The administrators were advised that said order from Judge Street was informal, and found that the lands offered would not command a fair value, and therefore made no sale of any of said lands."

This report was, by the Judge of the County Court, ordered to be received and recorded. The report was objected to by the counsel for the plaintiff, on the ground that it did not support or sustain the plea, in this, that the plea avers that the estate of the said Hugh McCann, deceased, had been reported insolvent, when the record produced, showed that the defendants had reported only the personal estate of the deceased to be insolvent; but the Court overruled the objection, and suffered the transcript to be read. The defendants having produced no other evidence, the plaintiff insisted that the transcript so produced and read to the Court, was not sufficient to sustain the plea, because the defendants had reported the personal estate alone of the deceased insolvent, and not his estate generally, as averred in the plea; and because the transcript showed that there were lands, whereof no report had been made, so as to show the estate of the deceased to be insolvent generally, as averred in the plea. But the Court decided that the transcript was sufficient to sustain the plea, and thereupon decided the issue in favor of the defendants. To which opinion of the Court, the plaintiff, by his counsel, excepted, and now assigns for error.

J. B. CLARKE, for the plaintiff in error, cited Aik. Dig. 151; Toulmin's Dig. 327, sec. 28.

MURPHY & JONES, contra, cited Aik. Dig. 152, 156; 1 vol. Phillips' Ev. 212; 2 *ibid.* Cowen's Notes, 522, to show that only the substance of the issue need be proved.

ORMOND, J.—The question to be determined, depends on

the construction of the statute. The portion of the act immediately applicable, is in these words: "Nor shall any suit or action be commenced or sustained against him (the executor or administrator) after the estate of the testator or intestate be represented insolvent. The counsel for the plaintiff in error, maintains that the "*representation*" of the executor or administrator, which will have the effect to prevent the commencement of a suit, or to abate one already commenced, must be both of the real and personal property of the deceased.—The language of the act is, "that when the estate, both real and personal, of any person deceased, shall be insolvent or insufficient to pay all just debts which the deceased owed, the said estate, both real and personal, shall be distributed to and among all the creditors respectively, due and owing, saving, &c. And the executor or administrator shall exhibit to the Orphan's Court or Chief Justice thereof, (before any debt paid to any creditor, except as aforesaid) an account and statement *as is directed in the twenty-eighth section of this act*, including also the lands, tenements and hereditaments of the testator, or intestate." Aik. Dig. 151. The twenty-eighth section of the act here referred to, was not incorporated in the Digest compiled by Mr Aikin, it being as he says, in a note, superseded, and therefore omitted, but as it is referred to in the section just cited, it must be looked to, to ascertain what the administrator is required to do. The 28th section provided that where an executor or administrator believed that the personal estate of his testator or intestate was insufficient to pay the debts of the deceased, he should "make and exhibit on oath, a just and true account of the personal estate and debts, as far as he could discover the same, to the Orphan's Court;" whose duty it should be to cause citation to issue, &c. Toulmin's Dig. 327, sec. 28. The law previously cited, is a part of the same act, and its obvious design was to provide a new mode for the distribution of the effects of a deceased person, when both his real and personal property was insufficient to pay all his debts. Instead of the common law mode, which then existed, (in 1803) the act provided for an equal distribution among all the creditors, except debts due for the last sickness, and the necessary funeral expenses, rateably. Although the 28th section before cited, was obviously designed to enable the executor or administra-

tor to represent an estate insolvent, when the personal property was insufficient to pay all the debts, it did not contemplate necessarily a rateable distribution among all the creditors as the whole estate, real and personal, might be sufficient for that purpose. But we apprehend that in either case, whether the personal estate alone was insufficient to pay the debts, or the whole estate insolvent, the executor or administrator has the right to report the estate insolvent; and that upon such representation, all suits pending against him abate. If it were not so under our system, an executor or administrator acting with the most perfect good faith towards the creditors, might be ruined. He could not plead *plene administravit*, because the real estate is by law made a fund for the payment of the debts of the estate, and it would frequently be impossible for him to know whether the estate was wholly insolvent or not, as that fact could only be certainly ascertained by a sale of the real estate.

Although the 28th section was not in terms re-enacted at the compilation of the new Digest, its provisions are in force from the operation of the act of 1822, (Aik. Dig. 180, sec. 16) which authorises the executor or administrator to petition the County Court for the sale of land, for the purpose of paying debts.—Such was clearly the opinion of the digester, and doubtless adopted by the legislature.

The appropriate and natural fund for the payment of debts, is the personal estate; nor has the personal representative of the deceased, as such, any control over the realty, until the estate is reported insolvent. We think it, therefore, clear, from the legislation on this subject, considered altogether, that if the executor or administrator has reason to believe that the personal estate is insufficient to pay all the debts, it is his duty to represent the estate insolvent; and that the effect of such representation, duly certified from the County Court, is to abate all suits then pending against him. No prejudice can result to creditors from this course; if the estate is not wholly insolvent, their debts are to be paid entire; and to prevent any unnecessary delay, if the executor or administrator having reported an estate insolvent, should omit for three months to apply for an order to sell the real estate, he is guilty of a *devastavit*, and may be sued on his bond. Aik. Dig. 150, sec. 17.

Let the judgment be affirmed.

PIERCE, et als. v. PRUDE & RUSSELL.

1. Exhibits to a bill may be proved *viva voce*, at the hearing : Therefore, when a cause is submitted for a decree, on the bill, answer and exhibits, and a decree made thereon, this Court will presume that the exhibits were proved before the Chancellor.

Writ of error to the Court of Chancery for the fourth district of the northern division.

The bill alleges that the complainants purchased from one William Burchfield, his right to one moiety of the west half of the north-east quarter of section 19, in township 18, of range 3 west; and also one moiety of four-sevenths of the east-half of the north-east quarter of the same section; Burchfield himself did not pretend to have the legal title to these lands, but held the bond of one Aquilla Pierce, conditioned to make him titles. This bond he assigned to the complainants, who exhibit it with their bill. The two moieties of the lands before described, were purchased from one Henley, by David and Aquilla Pierce, jointly. Henley executed to them jointly, a bond to make them titles. Aquilla Pierce died, subsequently to the assignment made by him to Burchfield, and David Pierce, after his death, procured Henley to execute a deed to him, conveying the entire interest in the said lands, in fee simple, by falsely representing that he was entitled to the whole, when in fact he was only entitled to one half. Aquilla Pierce was in possession of a portion of the lands when he sold to Burchfield, and delivered the possession to him, and he to the complainants, when they purchased. David Pierce is, however, in possession of the whole of the west-half of the north-east quarter of the section which he claims to hold, to the exclusion of the complainants.

The complainants also purchased from Burchfield at the same time, the east half of the south-east quarter of the same section, and received from him a deed in fee simple. Burchfield claimed title under a purchase from Aquilla Pierce, who conveyed to him by deed in fee simple, with covenants of war-

ranty. This half quarter was purchased from one Terrell, by David and Aquilla Pierce, jointly, who received a deed conveying the said land to them jointly, in fee simple. Aquilla Pierce had the possession of the whole of this half quarter section, at the time of the sale to Burchfield, and claimed to own it in severalty. The complainants do not know of any sale by David Pierce, of his interest in this half quarter section, to Aquilla Pierce, but they charge, that the former had passed to the latter his interest in the same, so that the latter had good right to sell and convey it to Burchfield. They also charge that Aquilla Pierce, at the time of the sale and conveyance, was in possession under claim of title, and that David Pierce was fully informed of the intention of Burchfield to purchase, and advised him to do so. Aquilla Pierce died in the year 1834, leaving William C., Frances D., Riley W., and Elizabeth Jane, his children, who are all under the age of twenty-one years, and who are his heirs at law.

From these facts, the complainants insist that they are the equitable owners of the west half of the north-east quarter, and two-sevenths of the east half of the north-east quarter, and to the east half of the south-east quarter of section 19, in township 18, of range 3, west; and that they ought to be permitted to enjoy the same, free from any claim, either by David Pierce, or the heirs at law of Aquilla Pierce.

On the 11th day of April, 1836, David Pierce commenced an action of trespass, to try title, against the complainants, and endorsed on his writ, that the object of his suit was to recover the east half of the north-east quarter, and the east half of the south-east quarter of the section before described.

That the said complainants cannot defend the said action in consequence of the said David Pierce having obtained the legal title to a portion of the said lands from the said Henley, in the manner before stated; and to another portion under the deed executed to him and Aquilla Pierce, by Terrell.

David Pierce, Burchfield, and the children of Aquilla Pierce, before named, are made parties defendants.

The bill prays an injunction against David Pierce, to restrain him from proceeding in the said suit at law; that he may be decreed to convey to the complainants one equal half of the west half of the north-east quarter, and one equal half of four-

sevenths of the east half of north-east quarter, and all his interest in the east half of the south-east quarter of section 19, in the township 18, of range 3, west; that the title of the heirs at law of Aquilla Pierce, may be divested, and for such relief against Burchfield as may be necessary.

An injunction was allowed on filing the bill, and at a subsequent term, Nancy Pierce was appointed *guardian ad litem* to the infant defendants. She answered, denying all knowledge of the facts alleged in the bill, but insisting, if they are true, she, as the widow of Aquilla Pierce, is entitled to dower in the lands. Burchfield answers the bill, and admits all of the material allegations.

David Pierce answers, and admits that it may be true, that the complainants purchased from Burchfield, in the manner stated by them, but denies any knowledge of it, or of the execution of the bond by Aquilla Pierce to Burchfield, or its assignment to the complainants. He admits that they are in possession of the east half of the south-east quarter, and of more than the one half of four-sevenths of the east half of north-east quarter of section 19, &c., but he denies that they have any right. He admits that he is in possession of the west half of the north-east quarter of the same section, and that a title bond was executed to himself and Aquilla Pierce, by Henley, but asserts that he was the *bona fide* purchaser of the said lands, and as such he always has retained the possession of the title bond; that the name of Aquilla Pierce, was inserted therein, at his instance, and he would have been entitled as part owner of the said land, upon condition that he paid his portion of the purchase money; the said Aquilla never had any interest in the same, except as trustee for the respondent, who paid the whole purchase money, except the sum of sixty dollars, for which judgment has been rendered against him, and for which he is now liable. He denies that he obtained the title deed from Henley, by fraud or misrepresentation. He admits the execution of the deed to himself and Aquilla Pierce, by Terrell, and that the same is now in his possession; that Aquilla Pierce was in possession of the land conveyed by that deed; the respondent held the deed because he paid the whole of the purchase money for the said land, and insists that his possession of the deed is sufficient evidence of his title. He denies that there

ever was any division of the lands, or that the said Aquilla ever had any right or title to the lands, or any portion of them, except as trustee for the respondent. He denies that he had any knowledge of the possession or title of Burchfield, and never advised him to purchase of Aquilla Pierce. He admits the death of Aquilla Pierce, and that he may have left children in the manner alleged; finally, he denies all fraud and combination, and prays to be dismissed from the bill, with costs, &c.

A general replication to this answer was filed by the complainant, but no evidence was taken in the cause by either party.

The injunction was dissolved on the coming in of the answer, and afterwards, at a subsequent term, the cause was submitted on the bill, answers and exhibits.

The Chancellor thereupon decreed, that the legal title of David Pierce, to one equal half of four-sevenths of the east half of the north-east quarter, and to one equal half of the west half of the north-east quarter of section 19, &c., should be divested from him and vested in the complainants; that the title of the complainants to the same, should be forever quieted from any claim from the heirs at law of Aquilla Pierce; that David Pierce, be perpetually enjoined from prosecuting his action at law, as to one equal half of the said four-sevenths of the east half of the north-east quarter, and as to one equal half of the east half of the south-east quarter of section 19.

The writ of error is sued out by all the defendants to the decree, and errors are assigned jointly, questioning the correctness of the decree, both with respect to Pierce and the heirs at law of Aquilla Pierce.

W. K. BAYLOR, for the plaintiffs in error.

PECK, for the defendant.s

GOLDTHWAITE, J.—At the first examination of this record, we were inclined to think that the decree of the Chancellor could not be sustained, because there seemed to be an entire want of proof, but then we did not advert to the fact, that the cause was submitted on the exhibits, as well as on the bill and answers. The exhibits could have been proved *viva voce*, at the hearing. *Levert v. Redwood*, (9 Porter, 79,) and al-

though the Chancellor does not state that they were so proved, it would be most unreasonable to conclude that the fact was otherwise.

The presumption which arises, from the fact that the case is decided chiefly on the evidence furnished by them, is also strengthened by the circumstance, that the cause was submitted on the bill, answers and exhibits. We therefore, conclude, that the exhibits were properly before the court, either by proof or in consequence of the submission. The exhibits show an agreement by Aquilla Pierce, to convey a legal and sufficient title for the lands in controversy to Burchfield; and the bond by which this agreement is proved, is assigned by the latter to the complainants. This, of course, is full proof of the main equity of the bill, as against the heirs at law of Aquilla Pierce, because it shows that he had divested himself of the equitable title; and if afterwards, in his life time, he had secured the legal title, it would have been in trust for the complainants.

The answer of David Pierce, admits the chief allegations of the bill out of which the equity of the complainants arise, so far as the land covered by the title bond executed by Aquilla Pierce to Burchfield and assigned to the complainants, is connected with it. That is to say, he admits that Henly executed a title bond to himself and Aquilla Pierce, to convey the lands to them jointly; that he has since given up this bond, and received a title in his own name. All which he asserts, about paying the entire purchase money, is irresponsive to the bill, and cannot avail him without proof. The case then stands of admitted facts, out of which a trust must be implied, with respect to the lands covered by the title bond. This trust inures to the benefit of the complainants, who by proving the exhibits, show themselves to be entitled to all the equities of Aquilla against David Pierce. We understand the decree, as not attempting to divest the title of David Pierce, to the land acquired by the deed from Terrell, as there was no proof of the alleged secret trust, and it being explicitly denied by the answer.

We think there is no error in the decree, and it is affirmed.

HOGAN V. DAVIS AND WIFE.

1. An order made upon a bill, intended as a bill of review, which suspends proceedings on the decree, in the original cause, ceases to be operative after such bill is dismissed for want of equity.
2. Where parties have neglected to proceed upon a decree, until their rights under it have become so embarrassed by subsequent events, that it is necessary to have the decree of the Court to settle and ascertain them, it is then necessary to file a new bill. But the mere lapse of time will not render such a step necessary, where the omission to execute the decree was assented to by the defendant.

This cause comes here by appeal from the Chancery Court, sitting at Mobile.

ON the 21st June, 1827, the appellant filed on the equity side of the circuit court of Mobile, a bill to foreclose the equity of redemption of the appellees to certain real estate, situate in that county, previously conveyed by way of mortgage, by the latter to the former.

On the 21st February, 1828, an order was made, taking the bill *pro confesso*, and referring it to the master to take and report an account of the amount due on the mortgage for principal and interest. The master having made his report, the court, on the 9th December, 1829, confirmed it, and rendered its decree, directing that the mortgaged premises be sold by the master, to pay and satisfy the sum ascertained to be due, with interest, costs, &c.

No proceedings appear to have taken place under the decree until March, 1831, when an agreement was signed by the parties to postpone the sale until the first of April,—after which we discover that similar agreements were made from time to time, up to December of that year, when the appellees presented, what they call a bill of review to the Circuit Court, then in session, praying an injunction against the decree of foreclosure. On that bill, the Court made the following order: "This day came the said parties by their solicitors, and it is ordered, adjudged and decreed, that the master in chancery appointed in the case of John B. Hogan v. George Davis, be enjoined from selling the premises of said George Davis mentioned in said de-

cree, on said Davis paying the sum of three hundred and eighty-five dollars and thirty-four cents, the amount of said Davis's own note, including interest, mentioned in the bill of complaint of Hogan v. Davis, and the decree made in said cause of John B. Hogan v. George Davis, be opened, and for nothing held, on payment of the said sum of \$385 34-100."

The bill being continued from time to time, on the 15th January, 1838, the appellant filed a demurer to the same; and upon the organization of separate Chancery courts shortly thereafter, the cause was transferred to that jurisdiction.

On the 15th May, 1839, the demurrer was brought on for argument, and thereupon sustained, and the bill of the appellees dismissed with costs. To revise that degree, a writ of error was prosecuted, and a judgment of affirmance here rendered, at January term, 1840.

In the transcript, there is an agreement, signed by both parties, bearing date the 6th July, 1840, by which it appears, that at the request of the appellees, the sale of the mortgaged premises was to be postponed to the first Monday in January thereafter. On the last mentioned day, it appears by the masters report, he sold in obedience to the directions of the decree of December, 1829, the mortgaged premises, and that the appellant was the highest and best bidder for the same, at the sum of seven thousand dollars, and consequently became the purchaser. A motion being made to confirm the report of the master, the appellees objected. *First*, because the decree of December, 1829 was reversed by the order of December, 1831, which still remained in full force. *Second*, because the decree of December, was of a date too ancient, to have authorised a sale under it in January, 1841.

The Court overruled the motion to confirm the master's report, saying, whether the first objection was well taken, it was not necessary to decide; as to entitle the appellant to the benefit of the decree of 1829, he should have filed a new bill.

STEWART, for the appellant.

B. F. PORTER, for the appellees.

COLLIER, C. J.—*First*, When a branch of this cause was here in January, 1840, a majority of the court were of opin-

ion, that the order made by the Circuit Court, upon what was intended as a bill of review could not be regarded as a final decree, from which an appeal or writ of error could be prosecuted. That that order, though couched in unusual terms, could only be regarded as the *fiat* of the court directing the suspension of proceedings on the original decree, and indicating its assent to a review of the proceedings, that they might if erroneous, be reversed.

If this view was correct, it is clear, that by affirming the decree of the Chancellor, dismissing the bill of review, not only the bill itself, but the proceedings had thereon, ceased to have any influence on the decree of 1829. The order was dependent for its support, upon the bill, and the bill being dismissed for the want of equity, the order became wholly inoperative.

Second, It is true, that in order to carry a decree into execution, it sometimes becomes necessary to file a new bill. This happens, generally, it is said, in cases where parties have neglected to proceed upon the decree, until their rights under it become so embarrassed by subsequent events, that it is necessary to have the decree of the Court, to settle and ascertain them. Story's Eq. Pl. 343.

It is not pretended that there has been any change of interest to prevent the execution of the decree of foreclosure and sale. The same persons are shown by the record, to be parties, that were complainant and defendants, in 1827. The bill of review does not appear to have been disposed of as early as we suppose it to have been practicable, yet the appellees cannot be allowed to avail themselves of its pendency, as an objection to the execution of the decree enjoined by it. They arrested proceedings by an order of a competent court, and however erroneous that order may have been, it was the duty of all concerned to yield obedience to it.

Not contented with the dismissal of their bill by the Court of Chancery, the appellees prosecuted their writ of error to this court, where in January, 1840, the decree was affirmed: all obstacles to the execution of his decree being removed, the defendant in a few months had the property advertised and sold. We think the cause of the appellant's delay, is sufficiently shown to have been superinduced by the legal difficulties interposed by the appellees.

We lay no stress upon the agreement from time to time, to postpone the sale, as the appellants case does not require such aid.

It results from what we have said, that the decree of the Chancellor, setting aside the master's report, must be reversed, and the cause remanded, that the report may be confirmed, and such other proceedings had, as may be necessary to make the execution of the decree of December, 1829, effectual.

HINES V. GREENLEE AND GREENLEE.

1. The record of a patent issued by authority of a law of the United States, is a public act, and if a second or duplicate patent should issue, it is of as high authority, and has the same effect as the original or first patent.
2. A suit having been commenced by three persons to recover a tract of land, and one dying pending the suit, it was continued in the name of the survivors. The jury found a verdict in their favor "for two undivided thirds of the land in the declaration mentioned," and assessed damages "by reason of the detention of the premises in the declaration mentioned:" Held, that a proper construction of the verdict was, that the damages were assessed for the detention of two-thirds of the land sued for, and not for the detention of the entire tract.

Error to the Circuit Court of Greene county.

THIS was an action of trespass to try titles, brought by the defendants in error against the plaintiff in error. The suit was originally commenced by three persons, one of whom, having died pending the suit, it was ordered that the suit survive in the name of the survivors. The jury found a verdict for the plaintiffs for "two undivided thirds of the lands in the declaration mentioned, and the sum of thirteen hundred and thirty-four dollars fifty cents damages, by reason of the detention of the premises, in the declaration mentioned," upon which the following judgment was rendered: "It is therefore considered by the court, that the plaintiffs recover of the defendant, two undivided thirds of the south-east quarter and of the north

west quarter of section thirty-two, in township twenty, of range three, east situate, in Greene county, the lands in the declaration mentioned pursuant to the finding of the jury, also the sum of thirteen hundred and ninety-four dollars fifty cents, damages by the jury assessed," &c.

Pending the trial, a bill of exceptions was taken, which sets forth that on the trial of the cause, the plaintiff, to establish his title, proposed to read as evidence to the jury, two copies of patents, which taken together, covered the land claimed in this suit, each bearing date on the first of September, 1824, and purporting to have been duly issued according to law, with a scrawl drawn around the letters L. S. thus (L. S.) where the seal of the General Land Office is always affixed in original patents of lands granted by the government of the United States. On the said copies of patents there was written the certificate of Commissioner of the General Land Office, in the words and figures, following: "General Land Office, October 26, 1837,— I hereby certify, that the within is a true copy of the patent on record in the office. In testimony whereof, I have hereunto subscribed my name, and caused the seal of the office to be affixed at the city of Washington, on the day and year above written."

JAMES WHITCOMBE, Commissioner.

To this certificate, the seal of the General Land Office, was duly affixed. The plaintiffs offered no evidence to the court of any diligence used whatever, to procure and produce the original patents, of which the copies were offered as above; nor did he in any manner, attempt to account for the absence or want of the originals. The defendants counsel objected to the copies being read as evidence, without such preliminary proof to the court, which motion was by the court, overruled and the copies permitted to be read as evidence of title, to which the defendant excepted.

The defendant now prosecutes this writ of error, and assigns for error,

1st. The admission of the copies in evidence.

2. The giving judgment for damages, for all the lands claimed in the declaration, when the defendants in error, were only entitled to two third, thereof.

• **THORNTON**, for plaintiff in error, cited the dissenting opinion of Judge Johnson, in the case relied on by the counsel for the defendant in error, reported in 5th Peters Rep. 241, and maintained that the copy or *inspeximus* of a grant, was not evidence *per se*, at common law, and that the statutes of 4th Edward, and 13th and 17th of Elizabeth, by which he insisted such copies were admitted, were not in force in this State.

J. B. CLARKE, contra,—cited 1st Phillips on Ev. 424; *ib.* 387; 2d Washington, 276; 7th Wheaton, 272; 9th Wendell, 44; 3 Littell, 330; 3 Stewart, 60.

On the point as to the verdict, 1 Bibb, 251; 4 *ib.* 194; 2 *ib.* 178, Littell, Sel. Cas. 367; 7 Porter, 441; 8. *ib.* 66; 9 *ib.* 118.

ORMOND, J.—Without entering on the enquiry whether the *constat* or *inspeximus* of the King's grant is as high evidence as the original at common law, or (as insisted by Judge Johnson,) that such effect is given to it by the statutes of 4th Edward and 13th and 17th of Elizabeth, we think the question, at least in this country, may be placed on clear and indisputable grounds.

The law provides that on certain acts being done, the citizen shall acquire title to a portion of the public lands, and that a *patent* therefor shall issue, which shall be recorded. The patent is not the title, but merely evidence, that according to law, a portion of the public domain has been transferred to a citizen. Its efficacy proceeds from the law which authorizes and requires certain public officers to issue and record it. The record showing this to have been done, is a public act, and therefore a second patent, which may issue, is not a copy of the first, but is rather a republication of the original, and imports the same absolute verity.

The difference between the record of patents and the registration of the deeds is, that the object of the latter is *notice*, and the registration is not of the essence, or necessary to the validity of a deed—but patents are by law recorded when issued. The record is therefore a public document.

Upon the subject of deeds, which by law are required to be enrolled, Chief Baron Gilbert, in his Law of Evidence, 87, says: "Where a deed needs enrolment, then the enrolment is the sign of the lawful execution of such deed, and the officer ap-

pointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient, for when the law has appointed them to be made public acts; the copy of such public acts shall be a sufficient attestation. But when a deed needs no enrolment, then, though it be enrolled the *inspeximus* of such an enrolment is not evidence, because since the officer has no authority to enrol them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence, for then, if the deed were doubtful, it were but to enrol it, and bring the copy or *inspeximus* in evidence, and thereby avoid producing a deed which was any way suspicious."

We are, for the reasons given, of the opinion, that the supposed copies offered in evidence, were of as high dignity as the originals, and that the Court did not err in permitting them to go to the jury.

Neither is the second assigment of error well taken. The jury find a verdict for two undivided thirds of the lands in the declaration mentioned, and assess damages "by reason of the detention of the premises in the declaration mentioned." It would be a forced construction, to suppose that the jury assessed damages for the detention of lands which their verdict ascertains do not belong to the plaintiffs; but the natural and fair interpretation is, that the damages were assessed for the detention of the lands which belonged to the plaintiffs. The course of this Court has been, to support the judgment of the Court below, when it can be concluded from the verdict, as is shown by the cases referred to by the counsel for the defendant in error.

There is no error in the judgment of the Court below, and it is therefore affirmed.

BELL V. THE REAL ESTATE BANKING COMPANY OF STARKEVILLE, MISS.

1. A contract by J, to deliver the entire crop of cotton which he might make during the year 1838, estimated at one hundred and seven bales, can not be declared on as a contract to deliver one hundred and seven bales of cotton absolutely, and without condition.
2. The proper construction of such a contract is, that it is an agreement to deliver the entire crop made by J, in the year 1838; and if he acted in good faith, and made no cotton, there is no breach; if a crop was made, but not delivered, the sureties to the contract are liable only to the extent of the value of the cotton made.
3. When Bank bills are at a discount, compared with specie, but the Bank is liable to be compelled to pay them in gold or silver, according to their tenor, the damages, properly accruing on the breach of a contract, of which such Bank bills formed the active consideration, can not be reduced because of their estimated depreciation.

Writ of Error to the Circuit Court of Greene county.

ACTION of assumpsit on a written guaranty, which is described in the three first counts of the declaration in these words:

"March 28th 1838. For and in consideration of having obtained from the Real Estate Banking Company of Starkeville, Miss., a loan of four thousand three hundred dollars, at nine months, I do hereby obligate myself, my heirs, &c. to deliver to said Real Estate Banking Company of Starkeville, Miss., the entire crop of cotton, which I may make during the present year, estimated at one hundred and seven bales, and to place the same in good order in due season, at McAlpin's bluff, on the Tombigbee river, then and there to be subject alone to the order of the said Real Estate Banking Company of Starkeville, Mississippi. It is understood that when said cotton is delivered, I am to have the privilege of directing as to where the same shall be sold; witness my hand and seal.

L. B. JOHNSON, (Seal).

We, the undersigned, bind ourselves as securities for the fulfilment of the above obligation.

WM. T. BELL, (Seal.)

JOHN M. BELL, (Seal.)

The fourth count, without setting forth the contract in *hæc verba*, describes it in substance, and avers that the principal,

Johnson, in the year 1838, made one hundred and seven bales of cotton. In this count, the breach is laid in not delivering the said one hundred and seven bales of cotton. In the previous counts, the breach laid is, that the said Johnson, did not deliver his entire crop, made in the year 1838, estimated at one hundred and seven bales: a fifth count describes the contract of Johnson, as a contract to deliver one hundred and seven bales of cotton absolutely, but in all other respects follows the terms of the contract as set out in the three first counts. In the fifth count, there is no averment that Johnson made any, or if any, how much, cotton in the year 1838, and the breach is laid in the non-delivery of one hundred and seven bales, at McAlpin's bluff.

The defendants pleaded the general issue, and one of them, Wm. T. Bell, also pleaded infancy; a verdict was found for the plaintiffs against the defendant, John M. Bell, and in favor of Wm. T. Bell, on the plea of infancy; on this verdict judgment was rendered.

In the progress of the trial, a bill of exceptions was sealed at the instance of the defendants, which discloses that the plaintiffs offered to read in evidence, the contract which is set out in the previous part of this statement. The defendant objected to its being read as evidence to support the fifth count of the declaration. The Court admitted it as evidence under all the several counts, to which the defendant excepted.

No evidence having been offered to show what amount of cotton was made by Johnson, during the year 1838, and it being admitted that he delivered none at the place designated in his obligation, the defendant asked the Court to instruct the jury that the covenant was not to deliver one hundred and seven bales of cotton, but the entire crop of cotton, which the said Johnson made during the year 1838; and the plaintiffs not having given any evidence of any cotton having been made by the said Johnson, during the year 1838, they could not recover any damages of the defendant; or if any, only nominal damages. This was refused: the defendant then asked the Court to charge the jury, that the measure of damages was, what the plaintiffs had lost by the non-delivery of the cotton, and not its value; and as no other evidence than the possession of the instrument of writing sued on, had been given of the injury the

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plaintiffs had sustained by the non-delivery of the cotton, but only as to the value of the one hundred and seven bales, the plaintiffs could not recover any damages; or if any, only nominal damages. This was refused.

Evidence having been given, showing that the money stated in the bond to have been loaned to Johnson, by the plaintiffs, was in the bills of the said plaintiffs, associated under the style of the Real Estate Banking Company of Starkeville, Mississippi, purporting to be bank notes, and in no other bills or money; and evidence having been given conducing to show, that at the time when the said Johnson received said bills, that the paper of the said Bank, was in market, greatly below the value of gold and silver coin. The defendants asked the Court to charge the jury, that if the value of the cotton, as ascertained by the evidence, exceeded the money loaned, then the measure of damages, if they find for the plaintiffs, would be the amount of money loaned and the interest thereon. This charge was given, with the direction, that the jury was not to be governed by the value of the Starkeville Bank paper, as shewn in evidence, but the same which was expressed in the bond, with interest, should be the measure of recovery, provided the value of the one hundred and seven bales of cotton exceeded that sum.

The defendant excepted to all the charges given, and to the refusals to charge as requested, and now assigns the same as error, as well as the refusal to exclude the contract from the jury under the fifth count of the declaration.

CLARK, with whom was Mr. GRAHAM, for the plaintiffs in error, insisted that the contract of Johnson, was to deliver his entire crop of cotton, and not any specific quantity. If this is true, it was incumbent on the plaintiffs to aver and prove how much was made by him, and its value before they could recover more than nominal damages; (5 Term Rep. 522; 7 Porter, 508; Chitty on Con. 20; 6 Porter, 344; 14 East, 160; 3 Vesey, 298; 9 ib. 325; 2 John. 357; 2 Pothier on Ob. 41; 3 Comyn's Dig. tit. covenant, 3, E. Doug. 125; 2 Camp. 56; 8 Peters' 197; 2 Bac. Ab. 77; Chitty on Con. 202; 5 Term, 291; 7 ib. 672; 8 Porter, 497; 1 A. K. Marshall, 422; 1 J. J. Marshall, 408; 3 Dana, 482; 5 ib. 324, 140; 2 Camp. 156; 2 ib. 327; 2 N. H. 287.) The measure of damages, was the value of the depreciated money paid to

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Johnson. Story on Bail. 2 ed. 2; Chitty on Con. 130; 5 Con. N. S. Rep. 23; 1 Porter, 273; 6 Cowen, 628; 8 Peters, 197.

THORNTON, with whom was Mr. JONES, contra, insisted that the contract was to be construed according to the motives which induced it; that it was clear that the one hundred and seven bales was inserted for the purpose of fixing the minimum quantity of cotton to be delivered, and without such a construction, the plaintiffs would be exposed to the greatest hazard, either from the fraud or the negligence of Johnson. See Thos. Raymond, 464; 13 East, 63; 3 J. J. Marshall, 94; 6 Conn. 249; 2 Gill & John. 382; 11 Mass. 302.

The measure of the damages was the value of the cotton, and the charge given, is more favorable for the defendant than is warranted by strict law. The money received by Johnson, might not, in market, be equivalent to gold and silver coin, but it certainly is in law, because the plaintiffs could have been compelled to pay their bills in gold or silver.

GOLDTHWAITE, J.—1. The chief question in this case, arises out of the construction of the contract given in evidence.

On the one hand it is contended, that this contract amounts to a warranty; that Johnson should deliver one hundred and seven bales of cotton; and on the other, it is insisted that no particular quantity is stipulated, but the entire crop, made by him, whether much or little, was to be delivered.

It is apparent that the parties contracted with reference to a commodity not in existence when the contract was made, and of which the quantity might be greatly increased or diminished, by circumstances over which neither could exercise any control. The quantity which Johnson might make, was entirely a matter of conjecture, even with himself, and certainly not less so with the plaintiffs. Under such circumstances we find him contract, to deliver his entire crop *which he might make* for the year 1838, estimated at one hundred and seven bales; and the defendants engaged to become bound as sureties for the performance of his obligation. It is only because of the introduction of the estimated quantity, that any doubt can exist as to the extent of the duties to be performed by Johnson, and consequently of the liability of the defendants in the case of his non-performance. It may be asked if one hundred and

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seven bales were intended to be stipulated for, why did the contract specify the crop which he might make for the year 1838, when he would be liable, if this crop should be entirely destroyed by the vicissitudes of the seasons; or why was *his* cotton stipulated for, if the delivery of *another* would have been an equal compliance with the terms imposed? Again, if this contract was intended as an absolute security for the sum loaned, why did not these defendants become bound for the money as it is evident that the cotton supposed to be stipulated for, and warranted as to quantity, would at a very moderate price per bale, produce the same result? These are questions which it seems to us cannot be satisfactorily answered under the supposition that the contract is determinate as to quantity.

There are several cases which seem to be very similar to this, and enable us to arrive at a satisfactory conclusion without difficulty. Thus in the case of *Boyd v. Seffkin*, (2 Camp. 326,) the contract was in these terms: "Sold for Mr. H. Seffkin, to Mr. M. Boyd, about 32 tons, more or less of Riga Rhine hemp, on arrival per *Fanny* and *Almira*, at £82 10s per ton. The ship arrived afterwards, but without a cargo. Lord Ellenborough held that this was a conditional sale, to be complete only on the arrival of the hemp. The parties did not mean to make a wager; the hemp was expected by the ship; had it arrived, it was sold to the plaintiff; but as none arrived, the contract was at an end. *Hames v. Hamble*, was a similar case, but differs from the first as being confirmed by the whole Court of King's Bench, (2 Camp. 327, note.) *Hayward v. Scougall*, (*ib.* 56.)

It might be inquired with equal force, whether the defendants intended to wager that Johnson would make one hundred and seven bales of cotton. They evidently did not intend to do so; they were willing to become bound that Johnson would deliver all the cotton he made, and to this extent they are bound, but no further.

We lay entirely out of view, all that has been said about a fraud, because, if such was the case, the action should not have been on the contract, but should have been for the deceit.—*Hames v. Hamble*, 2 Camp. 327, note.

2. We think, therefore, that the only construction which this contract can receive is, that the entire crop made by Johnson

in the year 1838, was to be delivered; if he acted in good faith and made none, there was no breach; and if a crop was made, but not delivered, the defendants are liable only to the extent of the value of the cotton actually made.

3. We understand the other instructions to amount to this, that the jury was not to compute the damages by the value of the bills received by Johnson when he obtained the loan, although it was shewn that they sold in the market at a discount, when compared with gold and silver coin; but the damages were to be computed upon the value of the cotton at the time and place appointed for its delivery; the whole sum considered, should not, however, exceed the sum loaned to Johnson, with interest on it.

These instructions seem to be as favorable to the defendant as the law would permit. Certainly, if the value of the Starkeville bills could come in question, it was correct to say to the jury that they must be computed as money; and the reason is, that the plaintiffs became liable to pay them according to their tenor, in gold and silver. It is not to be disputed that bank bills of most every kind would probably sell for much less than their nominal amount, if sold for coin; but this is not the proper criterion of their value, in practice; however much it may be in theory. The true question seems to us to be, were the bills issued in good faith, and could payment of them be compelled in coin? If this could be done, then they were of equivalent value to the obligation which Johnson gave for them.

For the error which we have already shown in the construction of the contract, the judgment is reversed, and the case remanded.

TAYLOR V. ROBERTS.

1. As a *general rule*, the answer of one defendant, in a cause in Chancery, is not evidence against his co-defendant.
2. Trustees are responsible for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other; or have, by their own voluntary co-operation, or connivance, enabled each other to accomplish some known object in violation of the trust.
3. A matter may be referred to the master, and his report made and confirmed, all at the same term of the Court.
4. Where a bill is improperly dismissed, at the hearing, as to one defendant, and a decree rendered against another, the complainant may reverse the order of dismissal on writ of error.

This cause comes here by writ of error from the Chancery Court sitting at Cahawba.

IN April, 1835, the defendant in error filed his bill against the plaintiff in error, Dillen Blevins and Fielding Vaughan, alleging that on the 18th February, 1833, Vaughan, together with one George Rives, made their promissory note for a valuable consideration, by which they promised to pay to the complainant the sum of one thousand dollars, twelve months after date. That after the receipt of that note by the complainant, he went to Montgomery on a visit, and while there, fell in company with Taylor and Blevins, who invited him to play at cards; that he yielded to their solicitations, and Taylor won from him the note of Vaughan and Rives, which he indorsed to him. The complainant further charges, that Taylor and Blevins were professional gamblers, and combined together to induce him to bet, &c. That suit had been brought in the Circuit Court of Dallas, by Taylor, against Vaughan, as an indorsee of the note, for the use of Blevins, and prosecuted to judgment.

The bill prayed that Vaughan be enjoined from paying, and Taylor and Blevins from collecting the judgment; that process of *subpœna* might issue; and that the money to be collected, be paid to the complainant.

Taylor and Blevins, in their answers, admit that the former

played at cards with the complainant; as he had alleged in his bill; that the note of Rives and Vaughan was bet by the complainant on the game, and upon his losing the same, that he indorsed it to Taylor, the winner; that suit had been brought thereon, as stated by the complainant, and judgment recovered against Vaughan. But these defendants explicitly deny all unfairness, in the playing on their part; and conclude, by praying in their answer, the benefit of a demurrer to the bill.

Upon the coming in of these answers, the defendants moved to dissolve the injunction, and dismiss the bill for want of equity; which motion was granted, and the bill dismissed generally, at the costs of the complainant. From this decree, the complainant prosecuted a writ of error to this Court; and the same was reversed, and the cause remanded.

Vaughan then came in and answered the bill, admitting the making of the note, and the recovery of the judgment thereon, as alleged; and stating that after the dissolution of the injunction against him, he had fully paid and satisfied the same.

Upon the coming in of Vaughan's answer, an order was made, at the instance of the complainant, requiring William S. Phillips, the attorney who obtained the judgment, at the suit of Taylor, to answer the bill within ninety days. Phillips answered, but stated nothing material, except the prosecution of the suit, the recovery of the judgment, and its payment after the dissolution of the injunction.

In the record there is a bill, purporting to be a supplemental bill, filed by the complainant, on which there does not appear to have been any proceedings; and which was voluntarily dismissed by him.

The cause coming on to be heard on the original bill, and the answers filed, the Chancellor rendered his decree, dismissing the bill as to all the defendants, except Taylor, and referred it to the master to ascertain and report the amount due on the note in question, for principal and interest. Whereupon, the master submitted his report, which was confirmed, and a decree rendered against Taylor accordingly—the reference, report and final decree being rendered at the same term of the Court.

J. B. CLARKE, for the plaintiff in error.

PECK & L. CLARK, for the defendant.

COLLIER, C. J.—It is insisted by the plaintiff in error, that the Chancellor erred,

1st. In rendering a decree against him for the note, or any part thereof.

2d. In rendering a final decree at the same term of the Court at which the master made his report.

1. When this cause was here at January, 1838, we decided, that the indorsement of the note of Rives and Vaughan, by the defendant in error to the plaintiff, being induced by a consideration, which the law denounces as illegal, passed no interest in the note to the indorsee as against his indorser; and that Taylor, and Blevins, who claimed under him with a full knowledge of the circumstances under which the note was acquired, could be “considered in no other light, than that of a trustee for the true owner.” 8 Porter’s Rep. 251.

This being the law of the case, the defendant in error was entitled to the full benefit of the judgment against Vaughan; or that being satisfied, he might recover of Taylor and Blevins, according to the sums they had respectively received on that judgment.

Though it appears from the answers of Vaughan and Phillips, that the judgment has been fully satisfied, and the proceeds paid to the order of Blevins; yet these answers can not be regarded as evidence against the other defendants to the bill. It may be considered as an indisputable *general rule*, that the answer of one defendant is not evidence against his co-defendant. This rule has its exceptions, but the case before us, is not one. 3 Phil. Ev. 931; C. & H’s ed. and the cases there cited. But Phillips was not a defendant, and his answer can not be considered in the scale of evidence, as entitled to more weight, than a mere *ex parte* affidavit taken at the instance of the complainant.

Placing the answers of Vaughan and Phillips, entirely out of view, as evidence against their co-defendants, and there is nothing to inform us, that the judgment against Vaughan has been satisfied. If it has not, the parties in whose name the suit was brought, we have seen, are mere trustees for the complainant, and should be declared such, and the judgment adjudged to belong to him.

It is not attempted by the bill to charge Taylor and Blevins

for a conversion of the note of Rives and Vaughan, and it may be well questioned, whether an action at law, founded upon such an idea, could be sustained; that Equity would not entertain a bill, in which such an allegation was the *gravamen* of the case, will not be disputed. Yet in order to sustain the decree, we must be satisfied, that Taylor was guilty of a wrongful conversion of the note, and that Chancery could afford to the complainant the proper redress for such an injury. The first conclusion can not be attained, for it appears both from the bill and answers, that the complainant, under the form of a contract, voluntarily parted with the possession to Taylor, and it is not pretended that the note has been used by him for a purpose not contemplated by the parties at the time he acquired it; and the latter conclusion is alike untenable, for a Court of Chancery will not lend its aid to repair an injury founded in a *tort*, and where the damages are unliquidated.

It appears from the answers of Taylor and Blevins, that they were jointly interested in the game at which the note was won of the complainant, and the suit was brought in Taylor's name, for the use of Blevins, although the latter was the owner of the note, because the former had omitted to transfer the legal interest by an indorsement. This being the case, if Taylor and Blevins are to be regarded as trustees for the complainant, then they must be liable each one for himself, for so much of the judgment as he received, or otherwise had the benefit of. The general rule is, that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other; or they have by their own voluntary co-operation or connivance, enabled each other to accomplish some known object, in violation of the trust. 2 Story's Equity, 520, *et post*.

There is nothing in the record showing, that Taylor and Blevins should be liable each for the money received by the other, on the judgment against Vaughan; and consequently they are individually liable for the amounts respectively received by them. If one of them has, in good faith, under a contract made previous to the exhibition of the complainant's bill, had the benefit of the entire judgment, then he alone should be subjected to the decree.

To recapitulate—the complainant was entitled to a decree, adjudging to him the judgment against Vaughan, if it was unsatisfied: if that judgment was satisfied, then he was entitled to a decree against Taylor and Blevins, severally, for such portions of it as they respectively received, or appropriated to their own use; or if one of them had the entire benefit of the judgment, then he alone should be charged. But the answers of Vaughan and Phillips could not be received as evidence to charge either Taylor or Blevins with the receipt of money on the judgment.

2. In *Mussina v. Bartlett*, (8 Porter's Rep. 277,) which was a bill for the foreclosure of a mortgage, we held that it was competent to refer the bill to a master, to take and report an account of the monies due upon the mortgage, and to receive his report and render a final decree in the cause, at the same term. This case is decisive to show, that the report of the master might be confirmed at the term at which it was made.

But upon the first point considered, the decree of the Chancellor must be reversed, and the cause remanded, that it may be disposed of, according to the principles indicated. The dismissal of the bill as to Blevins was erroneous, taking the facts stated by himself and his co-defendant Taylor, to be true, as from the posture of the case they must be; but in order to bring in Blevins again, it will be necessary for the complainant to obtain a reversal of the decree dismissing the bill as to him.

We have thought it proper to state the law applicable to this cause with particularity, that the complainant may be advised against whom he is entitled to relief, and by what proof the measure of that relief may be ascertained.

BIBB, Judge, &c. v. REID & HOYT.

1. Reid and Hoyt and one Hanrick agreed to become the sureties of W, in a bond about to be executed by him as executor: afterwards, Reid and Hoyt signed and sealed a bond, and delivered it to W, to become their deed in the event that Hanrick executed it also as surety. Hanrick never executed it, but the bond was delivered by W to the Judge of the County Court, as the deed of Reid and Hoyt. In a suit against them on the bond, to which they pleaded that the deed was delivered as an *escrow* merely—*Held*: First. That a bond may be delivered conditionally to a co-obligor, and will not be operative as the deed of the party, until the condition is performed. Second. That W was a competent witness to prove such conditional delivery having been released by Reid and Hoyt. Third. That the previous agreement, that Hanrick should be a surety, could not be given in evidence, because it did not refer to the bond which was actually executed, and therefore, not a part of the *res gestæ*.
2. All the defendants to a cause constitute but one party, and in a civil cause, are entitled to but four peremptory challenges. It would therefore be irregular to permit a further peremptory challenge; but, if the cause was tried by an impartial jury, such irregularity would not be available on error.

Error to Montgomery Circuit Court.

THIS was a suit on an administration bond, commenced by the plaintiff in error, against George Whitman, as principal, and the defendants in error as his securities in the penal sum of forty thousand dollars. The writ was returned, not found, as to Whitman, and executed on the defendants in error. To a declaration in the usual form, the defendants severally pleaded. The defendant, Hoyt, after craving oyer of the bond, "says *actio non*," &c. because he says, that at the time he signed said supposed bond, it was blank as to all the names thereto signed, except as to the name of George Whitman, and that before he signed his name thereto, said Whitman informed the defendant, that John W. T. Reid, who has signed said bond, and one Edward Hanrick, were to be joint sureties, with this defendant, and were, as such, to sign the same; and upon this information, and upon the condition that said Reid and said Hanrick, were to execute said bond, this defendant signed the same, but did not deliver the said bond to the plaintiff, but delivered the same to George Whitman, not as his deed, but to become his deed

only on the condition that the same should be executed by said Reid and said Hanrick, as co-sureties, and on this condition said Whitman was to deliver the same to said Bibb as his deed, and said defendant avers that said Hanrick never did sign and execute said bond, but that said Whitman, without the knowledge or consent of said defendant, procured one William T. Brame to execute the same as a co-surety, contrary to the agreement, and the condition upon which the said supposed writing obligatory was to become the deed of this defendant; but said George Whitman, without said Hanrick ever having signed and executed said bond, delivered the same to said plaintiff as this defendant's deed; wherefore he says that the said supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c.

The plea of the defendant, Reid, is in substance, the same as the preceding, except that it avers, "that said bond was not delivered to said plaintiff, but was delivered to George Whitman, not as his deed, but as an *escrow*, and to become his act and deed only, on condition, that Edward Hanrick should execute the same as co-surety." Both pleas were verified by affidavit.

The plaintiff demurred to the pleas, which being overruled, issue was taken thereon. Other pleas were also filed, but as they present no question for the consideration of this Court, need not be noticed. The defendants obtained a verdict, and judgment was rendered thereon by the Court.

Pending the trial, a bill of exceptions was sealed at the instance of the plaintiff, from which it appears that the plaintiff made no challenges, but rested satisfied with the jury as impanelled, that the defendant Reid, having made four peremptory challenges, the defendant, Hoyt, also, proposed to challenge other jurors peremptorily, which the Court permitted, though objected to by the plaintiff's counsel, and the defendant, Hoyt, accordingly made two peremptory challenges of jurors; to which the plaintiff excepted.

The deposition of George Whitman, the principal in the bond, he having been released by the defendants, was permitted to be read as evidence to the jury, though objected to by the counsel for the plaintiff; to which he excepted.

The defendants then introduced Edward Hanrick, who swore that he was not present at the signing or executing of the bond

by any of the parties, but was, notwithstanding, permitted to testify to several conversations he had with Whitman before the execution of the bond, no one else being present; and, also, conversations had separately with the defendants, Hoyt and Reid, before the execution of the deed, which declarations of said Whitman and defendants, tended to show that said bond was delivered as an *escrow*. To the introduction of this testimony, the plaintiff objected, but the objection was overruled by the Court.

The plaintiff prosecutes this writ, and now assigns for error,

1. Overruling the demurrer to the pleas.
2. Permitting more than four challenges to the defendants.
3. Permitting the testimony of Whitman to be read in evidence.
4. In permitting the evidence of Hanrick to go to the jury.

PECK and FAIR, for plaintiff in error, contended that a bond cannot be delivered as an *escrow* to a joint obligor, or to the obligee, but must be delivered to a stranger. 3 Halstead's Rep. 17; 2 Miller's Reports, 42; Sheppard's Touchstone, 57; 1 Paige, 385; 5 Cranch, 381; 8 Mass. 230.

CAMPBELL, contra; Croke Eliz. 835; Dyer, 34, b., 3 Wendell, 380; 7 Ohio Rep. 54; 6 Conn. N. S. 213; 10 Johns. 198; 17 ib. 196; 9 East. 360; 7 Pickering, 91; 1 Johns. Cases, 114; 9 Serg. & Lowb. 33; 4 Cranch, 219; 11 Peters, 86; 2 Harrington, 396; 11 Vermont, 448; 4 Barnewell and Ald. 440; 4 Stewart & Por. 159; 1 Stewart, 546.

ORMOND, J.—The principal question in this case arises on the demurrer to the pleas of the defendants. The defendants were sureties of one Whitman as administrator, and delivered the bond to him on the condition, that if another person signed it as co-surety, it was then to become their deed. It is urged that the conditional delivery could not be to the principal obligor, but to operate as a conditional delivery, must have been made to a stranger.

Delivery is essential to the validity of a deed, and is a question of fact evidenced by acts and declarations at the time, or inferred from the silence of the party; as where the obligor without any formal act or declaration permits the obligee

to take possession of the bond. The delivery must be by the obligor himself or by some one authorised to act for him. In this case, the efficacy of the delivery of the bond unconditionally, to the Judge of the County Court, by Whitman, must depend on his authority to do the act, and it would seem impossible to hold that an authority to another to deliver a bond, only upon the performance of a condition, was an authority to deliver absolutely. Such a proposition cannot be maintained unless established by some stern rule of necessity to prevent a greater evil. The ancient doctrine appears to have been as contended for by the counsel for the plaintiff in error. Thus it is said in Sheppard's Touchstone, 59: "So it must delivered to a stranger; for if I seal my deed and deliver it to the party himself, as an *escrow* upon certain conditions, &c.; in this case let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and (in reference to the legal operation of the deed) he is not bound to perform the condition." Thoroughgood's case, 5 Coke, 137. The reason of the rule appears to have been, that the act of delivery could not be qualified or controlled by a declaration made at the time, supposed to be inconsistent with it. This is undoubtedly true, as to all acts unequivocal in their nature. If one should discharge a loaded gun at another, he could not qualify the act by declaring at the time, that he meant no harm. But when an act is equivocal in its nature, and may mean one of two things, then it is certainly allowable to explain by a declaration at the time, the intent of the act. The rule as above stated in the Touchstone, has been recognised in the United States, in the cases cited from 5 Cranch, 351; 8 Mass. 230; 2 Sumner, 487; but it does not appear to obtain at this day in England, as appears by the case of Johnson and others v. Baker, 4 Barn. and Ald. 440, where a composition deed was delivered by a surety who had signed the deed to a creditor, not to be operative unless all the other creditors executed it. It was held that the deed was delivered as an *escrow*, and that all the creditors not having executed it, the surety was not bound. To the same effect, are the cases cited from 3 Wendell, 380; 11 Vermont, 448; 4 Cranch, 219; 2 Harrington, 396; 11 Peters, 86.

In the case cited from 4th Cranch, the bond was delivered

by a surety to the principal obligor to be delivered to the obligee, on condition other persons executed it as surety; such was also the fact in some of the other cases cited in argument, and a distinction may exist between a conditional delivery to a co-obligor, and such delivery to the obligee. Without, however, taking such a distinction, we are satisfied, that on principle, there can be no difference between a conditional delivery to a stranger, or to a co-obligor; that in either case the deed cannot be operative until the condition is performed, and such is clearly the weight of authority at the present day.

It was also urged, that on the ground of public policy, however the law might be in other cases, that in cases like the present, where infants and creditors were concerned, and the due execution of the bond entrusted to a public officer, that no conditional delivery could be made. We can see no reason for such a distinction. The Judge of the County Court is, by law, appointed to take the bond, and it is his duty not only to be satisfied that the sureties are able to respond in damages if called on, but also to know that it has been executed by them. If, as supposed by the counsel for plaintiff in error, the approval of the bond by the Judge of the County Court, is a judicial act, binding on the parties, the obligees would be concluded by it, although their names were forged, and a delivery by some one personating them. Such a conclusion cannot be tolerated, and we are very clear, that in approving an administrator's bond, the Judge of the County Court acts ministerially and not judicially. Indeed, the power to approve the bond is not given to the Court, but to the Judge. Aik. Dig. 177, sec. 3; and such has heretofore been the decisions of this Court, in analagous cases. 1 Stewart, 546; 4 Stew. & Por. 159.

The law authorising either party to make four peremptory challenges in all jury trials, does not authorise each defendant, where they sever in the pleading, to make four peremptory challenges. All the defendants to a suit, constitute but one party. But although the additional challenges should not have been allowed as tending to delay; and even in cases which might be supposed to defeat the ends of justice; yet, we cannot see how the plaintiff was prejudiced thereby, as we learn from the record that the cause was tried by an impartial jury; at all events, though this proceeding was quite irregular, on the

authority of the case of *Tatum v. Young*, 1 Porter, 298, it cannot be questioned in this Court on that ground alone.

The objection to the deposition of Whitman, the principal obligor is put in this Court on the ground of public policy, that the witness shall not be heard to allege his own turpitude. The rule here relied on, was first promulgated in the case of *Walton v. Shelly*, 1 Term Rep. 296, in relation to negotiable paper, and subsequently overruled by the case of *Jordain v. Lashbrooke*, 7 Term Rep. 601; but the rule was never held to apply to bonds. In this State, it never has obtained, even as to negotiable paper. The exploded rule seems to be the doctrine of the United States Courts, 6 Peters, 51; but in the case of the *United States v. Leffler*, 11 Peters, 86, it was held not to apply to bonds. The interest of the witness having been released by the defendants, the objection went to his credit, and he was a competent witness.

The remaining question is, the refusal of the Court to exclude from the jury the testimony of Hanrick.

The testimony which the Court refused to exclude, was certain conversations which the witness had separately with Whitman, the principal, and the defendants who signed the bond as sureties, at some period anterior to the signing of the bond, as to who were to join in the bond.

To understand the relevancy of this testimony, it is necessary to consider what was the issue between the parties. The proposition which the defendants undertook to establish was, that the bond was delivered by them to Whitman, to be their act and deed, only on condition that it was executed also by Hanrick, as co-surety. In what manner did the evidence of Hanrick tend to prove this? It does not follow as a consequence, that because there was an agreement between the parties at some previous time, that these three persons should be co-sureties, that such agreement existed afterwards, and when the instrument was in fact signed and sealed. If the testimony of Hanrick had related to the *time* when the bond was signed and sealed by the defendants, it would doubtless have been a circumstance from which the jury might have inferred that the delivery by two was only on condition that all should execute the bond, but as it does not relate to the time of the execution of the bond, it is not part of the *res gestæ*, and must be exclu-

ded as mere hearsay evidence. A party's own declarations, where they relate to the act itself, may, under some circumstances, be evidence for him as constituting a part of the *res gestæ*, and of this, the case cited from 6 Conn. Rep. N. S. 293, furnishes an example. The rule is laid down with great clearness and force by C. J. Hosmer, in *Enos v. Tuttle*, 3 Conn. Rep. 250, where he says, "to be a part of the *res gestæ*, the declarations must have been made at the time of the act done which they are supposed to characterise, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as to constitute one transaction." Tried by this rule, the testimony ought not to have been received, nor do we know of any rule of evidence which would authorise its admission.

It is supposed by the counsel for the defendants, that it should have been received to corroborate the testimony of Whitman: but this is merely another aspect of the same question. The object of the testimony of Whitman, was to establish the conditional delivery of the bond; and if the testimony of Hanrick did not, as we have seen, tend to establish that fact, how could it corroborate testimony which did? Or, in other words, how could testimony which was relevant, be sustained by that which was irrelevant? The probable result of its admission, was to mislead the jury; and it should therefore have been rejected. For this error, the judgment is reversed, and the cause remanded.

WYATT V. MAGEE.

1. Whenever the law affords any other adequate remedy, by which a party can enforce his rights, the proceeding by attachment for a contempt, is always within the discretion of the Court; and a refusal to exercise it, can not properly be reviewed by appeal, or by writ of error.

Appeal from the Court of Chancery for the first district of the Southern division.

THIS was a rule against the sheriff of Mobile county, for an

alleged contempt in disobeying an injunction. The Chancellor discharged the rule and the plaintiff appealed.

The facts as disclosed by the affidavits in support of, and against the rule, are these: Magee, as sheriff of Mobile county, had in his hands two executions against Wyatt, in favor of the Mobile Steam Cotton Press and Building Company; these executions were returnable on the 6th day of February, 1840, at which time Magee, returned them, satisfied, but he did not receive the money until the 12th of the same month, on which day he was served with an injunction, which Wyatt had obtained on a bill filed against the plaintiffs in execution. On the 13th of the same month, the plaintiffs in execution, moved the County Court for judgment against him for failing to pay over the money collected; this motion he attempted to defend on the ground of the injunction before served on him, but his defence was overruled, and judgment rendered against him. It does not appear that he placed the case against him in such a condition as to revise the decision, and he subsequently paid over the money collected from Wyatt, under the advice of counsel that he was obliged to do so.

The sheriff was informed, that if he paid over the money, it would be a contempt of the Court of Chancery, and he would be proceeded against in that court. No notice was given by him to Wyatt, of the pendency of the action, for not paying over the money to the plaintiff in execution.

DUNN, for the defendant in error, moved to dismiss the appeal and insisted that the decree of the Chancellor on such a matter, could not properly be reviewed. *Penn v. Messenger*, (1 Yeates, 1.) *Ex. parte, Chamberlain*, (4 Cowen, 49.) *United States v. Dodge*, (2 Gallison, 313.)

CAMPBELL, contra,—cited *Gates v. McDaniel*, (3 Porter, 356.

The Court having intimated an opinion, that the decision of the Chancellor could be reviewed, the case was submitted for a determination on its merits.

GOLDTHWAITE, J.—At first, we were inclined to believe that we could properly entertain jurisdiction of this case, inasmuch as it seemed to be merely a mode by which to ascertain

the rights of parties litigant, but subsequent reflection has satisfied us that we cannot.

It is true, that this Court, in the case of *Gates v. McDaniel*, (3 Porter, 356,) reversed the decree of a circuit Judge, who refused to grant a motion to commit a defendant for the breach of an injunction; but then the question of jurisdiction was not raised, and therefore it cannot be considered as an adjudication on this point.

It is evident that there are some cases in which the jurisdiction of chancery could not be enforced, if the proceedings for a contempt were omitted. In this class, are decrees for a specific performance; the surrender of title deeds; specific chattels, &c. &c. In such cases, and there may be many others, it is evident that process of attachment for a contempt of the decree, or a writ of sequestration, would be the only means which a party has of enforcing his rights, which have been ascertained by the decree. It is obvious in such cases, that the Chancellor has no discretion, but must award the proper process. If we were permitted to suppose that a Chancellor would ever refuse, it is clear that a mandamus would be allowed, if there was no other remedy.

But in general, the courts of chancery, as well as the courts of law, only use the power, to prevent contempts—as a means to preserve a proper respect for their tribunals; or to enforce their officers to perform duties, which are not only enjoined by law, but in the correct performance of which, others are also interested. Of the former class, it is very clear that an appellate Court, would never undertake to review a refusal by either court to punish an individual; and the same rule is believed to be properly applicable to the latter class.

When a sheriff, or other officer has collected money on process from a court of law, he will ordinarily be considered as guilty of a contempt, if he omits, or refuses to pay it over; but certainly there may be cases in which courts would not attach him, as if it was doubtful to whom the money belonged; and many other cases might be readily supposed.

So in the particular case now before us, the Chancellor certainly had the power to punish the sheriff for disobeying the injunction; and it is very doubtful whether the paying over the money under the judgment obtained in the County Court, on the

motion of the plaintiff in execution, afforded any legal excuse. We have a statute which requires the sheriff, who has collected money to refund the money collected from a defendant, who obtains an injunction before it is paid over to the plaintiff in execution, and this too under heavy penalties. Aikin's Digest, 162, s. 14.

But certainly, in such a case, it may be permitted to a Chancellor to hesitate, whether he ought not to refuse to commit for a contempt, and leave the parties to their remedies at law, to ascertain whether the judgment would or would not be a protection.

Our conclusion is, that wherever the law affords any other adequate remedy by which a party can enforce his rights, the proceeding by attachment, for a contempt, is always within the discretion of the court, and that a refusal to exercise it, cannot, properly be reviewed by appeal or writ of error.

It may be remarked, this conclusion does not in any way affect the authority of the case of *Gates v. McDaniel*, before cited, as that was a case in which there was no other proper remedy, other than by attachment. Whether a mandamus in such a case, however, is not more appropriate than a writ of error, is well deserving of attention.

Let the appeal be dismissed.

DRIVER AND SHELLY V. SPENCE.

1. On a contract, for the payment of eight dollars per acre, rent for a lot of ground supposed to contain ten acres, *more or less*, a final judgment can not be rendered by default for the rent of ten acres, but a writ of inquiry must be executed.
2. The sheriff returned the writ executed on one defendant; as to the other defendant, there was an acknowledgment of service indorsed on the procees, and subscribed with his name, but there was no proof of its genuineness—*Held*, that a judgment by default, against both defendants, was irregular.

THE defendant in error brought an action of covenant against the plaintiffs in the Circuit Court of Talladega, on a sealed instrument in the following words, viz: "On or before the first of January next, we, or either of us, promise to pay Sol. Spence, eight dollars per acre, for rent, for a lot of ground purchased from A. Q. Nicks, that Jesse Upton cultivated last year, supposed to be ten acres, more or less, the same being for value received; herein witness our hands and seals, this 3d of April, 1836.

GILES DRIVER, [Seal.]

J. D. SHELLY, [Seal.]"

On the writ are the following indorsements, viz. "I acknowledge the service of the within writ, Sept. the 27th, 1837.

J. D. SHELLY."

"Came to hand the 25th September, 1837; executed on Driver, the 27th September.

WM. BLYTHE, Sheriff,

By D. T. BLYTHE, Deputy."

A judgment final was rendered by default against the defendants, without the intervention of a jury; to revise which, a writ of error is prosecuted to this court.

J. L. MARTIN, for plaintiff in error.

CHILTON, for defendant.

COLLIER, C. J.—By the act of 1812, "concerning the assignment of bonds, notes, &c. and for other purposes," it is enacted that in all actions founded on any writing, ascertaining the

plaintiffs demand, or sum sued for, if judgment by default, *nil dicit*, or by *non sum informatus*, or on demurer be entered therein, the Court where the same action shall be pending, shall and may lawfully enter judgment for the debt, or demand, and interest thereon, to be calculated by the clerk of such Court, up to the time of rendering judgment, without the intervention of a jury to inquire of the damages, and award execution thereon as in other cases." Under the influence of this statute, it is insisted, that the judgment in the case at bar, is entirely regular; that the amount of the obligors, indebtedness was ascertained by their contract, and the intervention of a jury was therefore unnecessary.

In the justness of this argument, we cannot acquiesce. The obligors do not stipulate to pay any definite sum, but merely undertake to pay eight dollars *per acre*, for a piece of cleared land, which they *suppose* contains ten acres, *more or less*. The terms employed, clearly indicate that the parties did not intend to fix, with precision, the sum to be paid or received, but to leave it to be ascertained, what was the quantity of land rented.

The recital in the contract, that the land was supposed to contain ten acres, would be evidence to go to the jury, and in the absence of more satisfactory proof, should be regarded as *prima facie*, sufficient to show that such was the true number.

In *Norwood & Chambers v. Riddle*, (9 Porter's Rep. 425) a writ issued against two defendants. As to Norwood there was an acknowledgment of service, subscribed with his name; then, on the same day, the process went into the hands of the sheriff, who executed it on the other defendant, without saying any thing as to service on, or acknowledgment by Norwood. The Court held that the genuineness of Norwood's signature, should have been shown, or his acknowledgment proved in some other manner. This is a decision precisely adapted to the facts of this case, and conclusive to show that the judgment by default, was improperly rendered against Shelly.

The judgment upon both the grounds considered, must be reversed and the cause remanded.

VASTBINDER V. METCALF.

1. A writing purporting to contain the terms of a contract, but which the parties never executed by signing, cannot be read as evidence of the contract between the parties.
2. A witness may look at a memorandum which he has made of facts, for the purpose of refreshing his memory, but must afterwards be able to swear from his recollection of the facts, distinct from the memorandum.

Error to Baldwin Circuit Court.

THIS was an action of trespass on the case brought by the plaintiff in error against the defendant in error. The declaration contains two counts; first, for the use and occupation of land; and secondly, the common count for work and labor and merchandize sold and delivered. The defendant pleaded the general issue, with leave to give special matter in evidence.— This and another cause between the same parties, being consolidated, the jury found a verdict for the plaintiff for nominal damages, upon which a judgment was rendered.

A bill of exceptions taken during the trial of the cause, at the instance of the plaintiff, discloses that the plaintiff to maintain the issue on his part, offered evidence of the leasing and occupation of the premises, the value thereof, &c. and the defendant offered in evidence an instrument of writing, purporting to be made between the plaintiff and defendant, by which the former agreed to lease to the latter a saw mill for one year; to give the defendant the use of two slaves, &c. for the sum of eighty dollars in hand paid, but which was not signed by the parties, but was proved by the person who wrote it, to be the agreement under which the leasing was made. To the introduction of this paper, the plaintiff objected, but the Court permitted it to be read to the jury. The Court charged the jury, the writing was in evidence before them, and that the hiring of the slaves by the year, was an entire contract, and that if the slaves had been withdrawn from the service of the defendant, by the fault of the plaintiff, for half the year, the plaintiff could not recover; to which charge the plaintiff excepted.

The plaintiff prosecutes this writ of error, and assigns for error,

1. Permitting the writing to go to the jury as evidence.
2. In the charge given to the jury.

B. F. PORTER, for plaintiff in error, cited Chitty on Contracts, 8; 3 Johns. Rep. 534; 7 ib. 470; 12 ib. 470; 4 Wheaton, 425; 1 Sumner, 218; 1 Ala. Rep. N. S. 423.

ORMOND, J.—The bill of exceptions is so vague and uncertain, that it is difficult to say what point was intended to be presented in this Court. It is clear, however, that the Court erred in permitting the written memorandum of the contract to go to the jury as evidence. It is obviously an unfinished contract of the parties, which as it was never executed by either, is not binding on either, and was, therefore, no evidence of the contract between the parties.

A witness who has made a memorandum of facts, may refresh his memory by referring to it; and if by that means he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence. 1 Starkie on Ev. 127. For this purpose only, could this paper have been looked to by the witness, but it was not evidence for any purpose whatever, to go before the jury.

The charge of the Court in reference to the slaves, as an abstract legal proposition, is correct; and unless the contrary be shown, we must presume that the evidence authorised the charge to be given.

For the error of the Court in permitting the unfinished contract to be given in evidence to the jury, the judgment must be reversed, and the cause remanded.

THE STATE V. WHITTED.

1. An indictment, charging the defendant with selling spirituous liquors, to wit: rum, brandy, whiskey and gin, in less quantities than one quart, without having first obtained a license, is good.

Question referred by the Circuit Court of Wilcox county, as novel and difficult.

THE defendant was indicted for retailing, and convicted on an indictment charging the offence, in selling spirituous liquors, to wit: rum, brandy, whiskey and gin, in less quantities than one quart, to one James Gamble, and divers other persons, without first having obtained a licence from the County Court of Wilcox county, for that purpose.

It was moved in arrest of judgment:

1. That no offence is charged in the indictment.
2. Because the statute defining the offence, is not strictly pursued.
3. Because the defendant is charged with four distinct offences in the same count.

The Circuit Court overruled the motion in arrest of judgment, but considering the questions as novel and difficult; reserved the same for the consideration of this Court.

THE ATTORNEY GENERAL, for the State.

PECK, contra, cited *The State v. Raiford*, 7 Porter, 101.

GOLDTHWAITE, J.—The form pursued in this indictment, has been in use from the first organization of the State, and therefore, it is not improbable that this precise question has been made and decided upon every circuit in South Alabama, for the last twenty years; but notwithstanding the universality of this precedent, we are now called on to decide it as a novel and difficult question.

On the merits of the question referred, it may be said that the selling of any of the liquors named, would be an offence; but there is no more reason why an offender should be indicted

separately for each, than there would to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat, &c.

Let the judgment be affirmed, and certified to the Circuit Court as free from error.

MAUPAY v. HOLLEY.

1. Each count in a declaration is considered as the statement of a distinct cause of action, and where all are negatived by plea, the plaintiff is entitled to recover, by proving the allegations of either.

THIS was an action of *assumpsit* in the County Court of Mobile, by the plaintiff in error, to recover damages of the defendant for the failure to deliver according to his contract, twenty thousand mulberry trees, of the kind called *morus multicaulis*. The declaration contains two counts, in each of which the contract is stated differently. The cause was submitted to the jury, who returned a verdict for the defendant. On the trial, the Judge sealed a bill of exceptions, at the instance of the plaintiff, which sets out none of the testimony, but merely states several charges given to the jury. The only charge considered in the opinion of this Court, is in the following words: "The plaintiff, however, in order to recover, must make his testimony and declaration correspond; all the testimony going to prove facts not recited in the declaration, must be excluded, and *vice versa*; if he fails to prove any of the counts set forth in his declaration, he cannot recover."

A judgment was rendered upon the verdict, and the plaintiff thereupon, sued a writ of error to this Court.

STEWART, for the plaintiff in error.

CAMPBELL, for the defendant.

COLLIER, C. J.—There was no demurrer to the declaration, and the plea consequently, did not contest the legal suffi-

ciency of either count. Where a declaration contains several counts, each count is considered as the statement of a different cause of action; and where issue is taken upon all, the plaintiff is entitled to recover upon proving the allegations of either.

There can be no doubt, that where the defendant negatives, by a plea, the cause of action set out by the plaintiff, in order to recover, the latter must sustain his declaration, and that this can only be done by proof corresponding with its allegations.— But if it discloses several causes of action, there can be no necessity for proving each of them.

In the case at bar, the Court charged the jury, that “if he (the plaintiff) fails to prove any of the counts set forth in his declaration, he cannot recover.” This charge is directly contrary to law. The bill of exceptions is so exceedingly imperfect, that we cannot understandingly examine the other charges excepted to.

The judgment is reversed, and the cause remanded.

HITT V. LACEY.

1. A debt in suit, may under the attachment law of this State, be attached at the suit of a creditor of the plaintiff, in the same Court, where the suit is pending.
2. Where the defendant pleaded *puis darrien continuance*, that since the commencement of the suit, the debt sued for, had been attached in the same court, and that judgment had been obtained against him as garnishee, which he had satisfied; on demurrer, the plea was held good, but that the plaintiff was entitled to his costs up to the time of plea pleaded.

Error to the Circuit Court of Tuscaloosa.

THIS was an action of debt, on a promissory note by the plaintiff in error, against the defendant in error.

At a subsequent term, the defendant pleaded *puis darrien continuance*, that one Howe, had sued out an attachment against the estate of Hitt, the plaintiff, and had garnisheed the defendant; that the attachment was sued out after this cause was

commenced and returnable to the same Court. That defendant had appeared and answered the garnishment, and admitted that he owed the amount of the note now sued on, and also, that he had been sued upon it in this action. That judgment had been rendered in the attachment suit against Hitt, and also against defendant as garnishee, for two hundred and forty dollars, ninety-five cents, which judgment on the — day of — he paid and satisfied, and prays judgment, &c. To this plea, the plaintiff demurred, and the demurrer was overruled by the Court, and judgment rendered against the plaintiff for costs.

From this judgment, the plaintiff prosecutes this writ, and assigns for error,

1. The judgment of the Court on the demurrer.
2. Giving judgment against the plaintiff for costs.

PECK & CLARK, for plaintiff in error,—cited 13 Peters Rep. 136.

MOODY, *contra*,—referred to 20 Johns. Rep. 229; 4 Cowen, 521, note.

ORMOND, J.—We cannot perceive any reason why an attachment will not be sustained, merely because the defendant in the attachment has commenced a suit against his debtor previous to the suing out of the attachment and the summons of his debtor as garnishee. Our statute authorises an attachment to be levied on a debt due the defendant in attachment, and by a garnishment against such debtor, subjects the debt in his hands to the payment of the claim prosecuted in the attachment. It certainly is not the less a debt, because a suit has been commenced upon it, and therefore would seem to be within the very letter of the statute.

The case cited from 13 Peter's Reports, is not like this case. There, the suit against the debtor, who was afterwards garnisheed, was commenced in a Court of the United States, previous to the commencement of the suit by attachment in one of the State Courts. This appears to have been a principal element of the decision of the court. It is stated in the judgment of the Court that, "the jurisdiction of the District Court of the United States, and the right of the plaintiff, to prosecute his suit in that Court, having attached, that right could not be ar-

rested, or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice." Now, here the suit brought by the defendant in the attachment against his debtor, and the attachment against him, are both prosecuted in the same Court, no conflict of jurisdiction. therefore, can by possibility arise, and no reason can, in our opinion, exist, which would justify the Court in refusing to give effect to the statute. The precise point here raised, was determined by the Supreme Court of Pennsylvania, in *McCarty v. Emlin*, (2 Yeates' Rep. 190,) in which it was held that a debt in suit might be attached in the hands of the defendants in the suit; (McKean,) C. Justice, saying that the English decisions in which the contrary doctrine was held, proceeded on the ground that the inferior Courts, in which alone this proceeding could commence by the custom of London, could not interfere with a matter in suit in the King's superior Courts.

In *Zurcher v. McGee*, decided at the last term, we held that money collected on a judgment, could not be attached by process of garnishment, in the hands of the sheriff, on the ground that it was in the custody of the law and did not become the property of the judgment creditor until it was paid over to him. It is obvious that decision does not affect the present question; and we are of opinion that no obstacle exists to giving effect to the plain direction of the statute.

But, as the plaintiff had a right of action when he commenced his suit, and which is admitted by the plea, *puis darrein continuance*, no judgment could be rendered against him for costs. The judgment of the Court below must therefore, so far as it relates to the costs, be reversed, and here rendered for the plaintiff in error, up to the time of plea pleaded.

GOLDTHWAITE, J.—I dissent from so much of the opinion just pronounced, as reverses the judgment, because costs were given to the defendant. I think the plaintiff was entitled to costs, only in the event of confessing the plea; here, however, he contests the defence, and I think all the precedents are, that he is chargeable with the costs.

McCORD v. LOVE AND WILLIAMS.

1. Where L. owned five slaves and W. owned three others, and it was agreed between them to work them on a plantation, for the joint benefit of L. and W; and afterwards a contract was made by L. with the defendant, for services to be performed by the whole number of slaves; L & W may join in an action for the breach of this contract, notwithstanding the defendant was ignorant of any interest of W in the contract.

Writ of error to the Circuit Court of Lowndes county.

ACTION of assumpsit on a special contract, by which the defendant, in consideration of the services, of certain slaves of the plaintiffs, to be performed, promised to furnish eighty acres of cleared land, and plant twenty-five or thirty acres of corn for the plaintiffs. The declaration contains also a count for work and labor done by said slaves. Issues were joined on several pleas, and a verdict returned for the plaintiffs, on which judgment was rendered.

At the trial, it appeared that the contract was made by the defendant with Love, and there was no evidence, shewing that the former knew that Williams had any interest in the contract, or in the slaves; five of the slaves were owned by Love, and three were owned by Williams. Williams lived in South Carolina, and had sent three slaves to Alabama, by Love, for the purpose of farming together. The services were performed by all the slaves.

On this state of facts, the defendant requested the Court to instruct the jury, if they believed the eight slaves were the separate, and not joint property of the plaintiffs, they could not recover, unless they proved a promise by the defendant to pay them jointly. This was refused, and the defendant excepted. This refusal is now assigned as error.

CLARK, for the plaintiff in error,—cited *Lloyd v. Archbowl* (2 Tuunt. 324.)

COOK, contra,—cited *Skinner v. Stocks*, (4 B. & A. 437.)

GOLDTHWAITE, J.—The true rule, with respect to the parties in such an action as this, is the one declared by the

Court of King's Bench, in the case of *Skinner v. Stocks*, (4 B. & A., 437.) The action may be maintained, either in the name of the person with whom the contract was actually made, or in the names of the parties really interested. If the introduction of these names makes any difference in fact, to the defendant, by affecting his right of set off, it is supposed he could plead the set off so as to show his right; or if this could not be done, he perhaps, could apply to the Court for relief. The case of *Lloyd v. Archbowle*, (2 Taunt. 324,) only decided that the action could be maintained in the name of the one with whom the contract was made, although there might be others, who were also beneficially interested, but so far as the reasoning of the Court of Common Pleas goes to sustain the proposition, that he only could sue, it is overturned by the case in the King's Bench.

We think it sufficiently appears, that the plaintiffs had a joint interest in the slaves, for the period during which the services were rendered.

The instructions requested by the defendant, were properly refused, and the judgment is affirmed.

BUMPASS v. WEBB.

1. The plaintiff recovered a judgment at law against the defendant, to restrain the collection of which, an injunction was awarded at the instance of the latter, and the usual bond executed; the injunction being dissolved, the defendant's land was sold under a *fiery facias*, and the plaintiff became the purchaser thereof; an action being brought to recover the possession, on the trial the plaintiff offered in evidence, the record of the case, in which the judgment had been recovered: *Held*, that the evidence was admissible, notwithstanding it was objected, that the deed from the sheriff, the decree dissolving the injunction, and the injunction bond were not produced.
2. If one against whom an action is brought to recover the possession of land, would put an end to the suit, and prevent the recovery of damages, for a longer period of occupancy, he should make a disclaimer in open Court, or in some other manner, and yield the possession to the plaintiff.
3. In an action to recover the possession of land, a verdict and judgment which conclude the matter in controversy, may be aided by the description of the premises in the declaration.
4. In an action of trespass to try titles, the plaintiff may recover damages beyond the sum laid in the writ and declaration.
5. The quashing of a writ of *fiery facias*, after it has been executed, does not necessarily avoid all proceedings, which have been had under it.
6. All reasonable intendments are made in favor of the regularity of the proceedings of Courts of general jurisdiction; and *Seemle*, that an appellate Court will not reverse a judgment *on error*, because at some term previous to the trial, a judgment of non-suit was set aside at defendant's cost, though in such case he might not be remediless.

Writ of error from the Circuit Court of Lauderdale.

THIS was an action of trespass, brought by the defendant in error, against the plaintiff in the Circuit Court of Lauderdale, as well to try title to eighty acres of land, as to recover damages for its occupation.

The cause was tried on the plea of "not guilty." On the trial, a bill of exceptions was certified, at the instance of the plaintiff in error; from which, among other things, it appears, that the plaintiff below, claimed title to the premises in question, under a purchase made at a sale, in virtue of an execution, at the suit of himself against the defendant. The plaintiff offered in evidence, the record of the cause in which the execution issued, but the defendant objected to its admission: *First*, because the deed from the sheriff was not produced: *Second*, because

the decree dissolving the injunction which had been granted to restrain the execution of the judgment on which that execution issued, and the injunction bond, to which was given the effect of a judgment, were not shown; but his objection was overruled, and the evidence was read to the jury.

The writ of *fiery facias*, on which the land was sold, recited the injunction bond, and the dissolution of the injunction; and the defendant below, by his counsel, moved the Court to charge the jury, that in order to make out the plaintiff's title, it was necessary for him to produce that bond, and the decree by which the injunction was dissolved: but the Court overruled the motion.

It appeared, that more than three years previous to the trial, the defendant below, ceased to occupy the premises; but there was no proof that the plaintiff was informed thereof. The Court instructed the jury, that the plaintiff, if entitled to recover the land, was entitled to damages for the period intervening between the time of abandonment and the trial.

The land sued for, is described according to its legal division and sub-division, yet the jury merely say "they find the land for plaintiff, and also assess the plaintiff's damages," &c. The judgment is, that the plaintiff recover the damages assessed, &c., with costs and that "a writ of restitution be issued to the plaintiff, &c."

The damages are laid both in the writ and declaration, at "five hundred dollars," while those assessed by the jury, exceed eleven hundred.

In the record, we find the following entries; the first made at October Term, 1834, the latter, at April Term, 1835.

<p>"John Webb, v. Gabriel Bumpass.</p>	}	<p>Motion by the defendant to quash the execution, in this cause, and for sufficient cause appearing, it is considered that said execution be quashed."</p>
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<p>"John Webb v. Gabriel Bumpass,</p>	}	<p>Motion to set aside a non-suit and motion sustained, with defendant's paying the costs of this Term."</p>
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These are the only parts of the record brought to the view of the Court by the assignment of errors.

The plaintiff assigns for error:

1. The Court improperly admitted the evidence objected to, as shewn by the bill of exceptions.
2. The Court erred in refusing the instruction asked for, and also in the charge given to the jury.
3. The verdict and judgment do not describe the land sued for.
4. The damages assessed by the jury, exceed those laid in the writ and declaration.
5. The execution being quashed, the title of the plaintiff was itself extinguished.
6. It was irregular to tax the defendant with costs upon setting aside a non-suit on plaintiff's motion.

PETERS, for plaintiff in error.

McCLUNG, for defendant.

COLLIER, C. J.—1. In respect to the admission of the record of the cause in which the execution issued, under which the defendant in error purchased, we can discover no error. There was no necessity for producing the sheriff's deed to the premises, in order to let in proof of the record; conceding that, that paper was an essential link in the chain of title, yet its non-production, did not warrant the exclusion of other evidence material and pertinent. The plaintiff in error could not have been prejudiced, for it was entirely competent for him to have asked the Court to instruct the jury as to the legal effect of evidence; and if he deemed it necessary to his protection, he should have called upon the Court to charge them, that in the absence of the deed, the case had not been made out.

It may be observed, that the plaintiff in error, was the defendant in the execution referred to, and that the land now in dispute, was sold as his property. Now it may be true, that where one is seeking to recover upon a title acquired by purchase at a sheriff's sale, he should show a judgment, yet that principle is not applicable to a case circumstanced as the present. Here, the objection is not that there was no judgment, but, that the judgment had been suspended in its operation by an injunction, which for any thing appearing to the contrary, is still in full force. The injunction did not vacate the judgment, it merely inhibited its execution, until the case should be

passed on by a Court of Equity. Should an execution issue in the meantime, in despite of the injunction, it would not be void, but merely voidable, and a sale under such process before it had been vacated by the judgment of a Court, would confer upon the purchaser a good title. The injunction bond was not essential to charge the plaintiff in error, because, as we have seen, independently of it, there was a judgment against him. The non-production then, of the proceedings in Chancery, could not at all prejudice, the right of the plaintiff below to recover.

2. The idea that the defendant, in an action to recover the possession of land, and damages for its occupation, is not chargeable with damages beyond the period of his actual possession, where he ceases to occupy pending the suit without notice to the plaintiff, is clearly indefensible. The plaintiff is not bound to know, whether the land continues to be occupied, nor if the possession becomes vacant, pending the litigation, is he obliged to inquire, whether, the defendant in removing from it, intends to relinquish to him the title and possession. But if the defendant would put an end to further controversy, it is very easy for him to cause a disclaimer to be made in open Court, or in some other manner to renounce his title, and yield to the plaintiff the possession; when this is done, he may insist upon an abatement of damages, at least after the close of the current year.

3. The omission to describe the premises in question, in the verdict and judgment, is unimportant. They are described with sufficient particularity in the declaration, and to that the verdict and judgment must be understood to refer. True, the judgment entry is eminently informal, but it is sufficient to inform us what the Court intended to do, and is conclusive of the matters in controversy.

4. It is objected that the damages laid in the declaration, did not authorise the assessment made by the jury. The precise question raised by this objection, was made in *Campbell v. Judson*, at June, '36. There, the damages were laid at two thousand dollars, and the jury assessed them at five thousand one hundred and twenty dollars. The Court considered the case of *McWhorter v. Standifer*, (2 Porter's Rep. 519,) as decisive of the question, and consequently affirmed the judgment of the Circuit Court, without a written opinion.

5 and 6. In respect to the entries in the record, quashing an execution, and setting aside a non-suit and charging the defendant with the costs of the term, it may be said, that unexplained as they are, it is difficult to understand them. The record nowhere informs us, that an execution had issued in this cause, and it is insisted that we must intend, that the execution referred to, is the one under which the land in dispute was sold. Such an intendment, cannot, with propriety be made from the brief recital in the record. But even if it could, the plaintiff in error, would not be benefitted, as the quashing of an execution, will not necessarily divest a purchaser's title.

The record contains no entry of a judgment of non-suit, nor does it appear that an execution for the costs of a term issued against the plaintiff in error. It may then, in the absence of any thing to explain it, and under the influence of the rule, which makes all reasonable intendments in favor of the proceedings of Courts of justice, be supposed that the entry was a mere correction of a decision of the Court, not then recorded; and serves to show that the plaintiff should not have been non-suited, and that the defendant, for some default, should pay costs, not that the costs were the consequence of setting aside the non-suit. Or, it is possible, that there is a clerical error in charging the defendant, instead of the plaintiff with costs, which the Circuit Court can correct. Be this as it may, we are strongly inclined to the opinion, that such an entry as that shown by the record, even though in itself erroneous, must be controlled and corrected in some other manner than by a writ of error, to revise the final judgment.

This view is decisive of the case, and the consequence is, that the judgment of the Circuit Court is affirmed.

GAINES V. BEIRNE & McMAHON.

1. No judgment can be rendered against a garnishee, on his answer, until judgment is obtained against the defendant in attachment.
2. The statute contemplates the *viva voce* examination of the garnishee, in open Court; and although this may be dispensed with, and the answer received in writing, it is no part of the record, unless made so by bill of exceptions, or incorporated into the judgment by a recital of its substance: when, therefore, the clerk sent up a writing, purporting to be the answer of the garnishee, which varied from the recital of the answer in the judgment, it was disregarded.
3. Where two persons were garnisheed as co-partners, and appeared and answered, and the judgment was afterwards rendered against one, as surviving partner, this Court will presume the necessary proof was made, in the Court below, of the death of one of the firm.

Error to the Circuit Court of Mobile.

THIS was a suit commenced by attachment by the defendants in error, against one George W. Gresham, in which the plaintiff in error, and one James Fitzsimmons, were summoned as garnishees, by the style of Gaines & Fitzsimmons. The sheriff returned that he had served the garnishment, both on Gaines and Fitzsimmons. Fitzsimmons appeared at the return and answered, which is inserted in the record sent up, and is to the following effect: "James Fitzsimmons, one of the firm of Gaines & Fitzsimmons, answers on oath, that he is indebted to the defendant, in the sum of six hundred and eighty-five dollars fifteen cents."

Signed, JAMES FITZSIMMONS.

At the same term, a judgment was rendered on the answer, against Gaines & Fitzsimmons.

At the succeeding term of the Court, a judgment was obtained by the defendants in error, against the defendant in the attachment, and at the same term a judgment was rendered against the garnishees, as follows: "This day came the plaintiffs by attorney, and on motion of the plaintiffs, it is considered by the Court, that the plaintiffs recover from the said Gaines surviving partner as aforesaid, the sum of six hundred and eighty-five dollars, fifteen cents, being the amount specified in their answer, filed at the Spring Term, 1839, of this Court, in obe-

dience to a summons of garnishment, as in the case of the said plaintiff against the said George W. Gresham," &c.

From this judgment, Gaines has prosecuted this writ of error, and now assigns for error :

1. The rendition of judgment at the Spring Term, 1839.
2. The Court erred in rendering judgment against the garnishees without it being shown that they were liable.
3. The Court erred in rendering judgment against the appellant at Spring Term, 1840.
4. The Court erred in rendering judgment twice for the same demand.

STEWART, for plaintiff in error.

ADAMS and PECK, contra.

ORMOND, J.—The first judgment which was rendered against the garnishees, was rendered too soon. There is no authority to render judgment against the garnishee upon his answer, until a judgment is obtained against the defendant in attachment, that being the only authority for condemning the money in the hands of the garnishee. This judgment is therefore of no effect, and cannot prejudice the garnishee.

The final judgment which was rendered against the garnishee, after judgment against the defendant in attachment, is now resisted on the ground of the want of authority to render a judgment against the firm of Gaines & Fitzsimmons, upon the answer of Fitzsimmons, admitting that he individually was indebted to the defendant in attachment. This objection would probably be fatal to the judgment, if we could consider the answer of Fitzsimmons, a part of the record. The statute contemplates a *viva voce* examination of the garnishee, in open Court. In practice, we know that this is frequently dispensed with, and that the garnishee makes his answer in writing.

But whether the answer is made in one mode or the other, it is not a part of the record, unless made so by bill of exceptions, or incorporated in the judgment by reciting the substance of the answer. The case, here then is a conflict between a judgment of the Court and an informal paper, which the clerk has sent up, but which is no part of the record.

It is scarcely necessary to add, that we must give credence

to the record, and from that it appears that the plaintiff was cited, that his co-partner appeared and answered, admitting the indebtedness of the firm, to the defendant in attachment. The record does not disclose the death of Fitzsimmons, further than it may be inferred from the rendition of judgment against the plaintiff, as surviving partner; but as no exception is taken, we must presume the necessary proof was made in the Court below. The appearance of the party rendered a judgment *nisi*, unnecessary, and the final judgment was properly rendered.

We can perceive no error in the record and the judgment must therefore be affirmed.

MACON AND STEPHENS V. OWEN.

1. In proceeding by writ of *ad quod damnum*, to establish a mill, its location should be ascertained, either by the inquest or the judgment of the Court, with sufficient certainty of description to enable a surveyor to find the place designated. Nothing can be claimed under a grant to build a mill in number seven, of township nineteen, of range twenty-five; as the location is not sufficiently definite.
2. Where a writ of *ad quod damnum* was sued out on the seventh of September, 1836, returnable to the next term of the Orphans' Court, (which holds its sessions monthly) and no proceedings are had on it until the next February, it is to be considered as abandoned, and a grant to build a mill, afterwards made on this writ, will not over-reach a grant made to another, who sued out his writ in December, 1836, and prosecuted it without delay, so as to obtain a judgment in January, 1837.

Writ of error to the Circuit Court of Macon county.

ACTION on the case, for overflowing a mill erected by the plaintiffs. The defendant pleaded not guilty, and a verdict was found in his favor, on which judgment was entered.

A bill of exceptions was sealed at the trial, at the instance of the plaintiffs, which discloses that they gave in evidence the exemplification of certain proceedings had in the County Court of Macon county, on a writ of *ad quod damnum*, sued out by them on the 5th day of December, 1836, and returnable to the

next Orphans' Court. A jury was summoned, who returned their inquest, which states as follows: "We, the jury, being duly summoned, and being sworn, have examined particularly, the creek, its banks, descent, &c. on the south half of section six, township nineteen, of range twenty-five, in Macon county, and agree fully in saying, that Pleasant Macon and Solomon Stephens shall have liberty to erect a saw or grist mill, or both.

Messrs Macon and Stephens own the land on both sides the stream; the pond will be small, the banks high, consequently, not at all a nuisance to the settlement, and interfering with no person, either by overflowing land, orchard, lot, dwelling or curtilages. We find no damage accruing from the erection of said mill or mills, to be built on the lower shoal on said creek, on the south half of section six, as above described.

In witness whereof, &c.

The writ and inquest were returned to the Orphans' Court of said county, on the first Monday of January, 1837, and the Court then made an order, which, after reciting the proceedings by the sheriff and jury, proceeds thus: "And the Court being sufficiently advised in the premises. and it appearing that the facts in said inquest are correct;—it is ordered and determined that the said Pleasant Macon and Solomon Stephens have liberty to build a mill on the said south half section six, &c. in Macon county."

The defendant gave in evidence the exemplification of certain other proceedings had in the same Court, on another writ of *ad quod damnum*, sued out at his instance, on the 7th day of September, 1836, returnable to the next term of the Orphans' Court. This was executed on the 24th of the same month, but no proceedings were had by the Orphans' Court on the writ and inquest until the first Monday of February, 1837; at which term the inquest was returned with the writ. The inquest is stated in these terms: We, the jury, do certify that we have examined a mill shoal, according to the order granted to Robert Owen, of Chambers county, and believe it to be to the benefit of the public, and grant him leave to erect a set of mills on number seven, in township nineteen, of range twenty-five, in Macon county, and to put a dam on the same, to be ten feet high; and further, have given to Pleasant Macon the sum of fourteen dol-

lars and fifty cents, the damages assessed by us. Whereupon, it appearing to the Court that the said jurors were sworn and charged by the said sheriff, impartially and to the best of their skill and judgment, to view the lands upon which it was proposed to erect said mills, to examine the lands above and below, the property of others, which might be overflowed, to say what damages it would be to the several proprietors, offices, curtilages or gardens, thereunto belonging, or orchards, would be overflowed; to inquire whether, in their opinion, the health of the neighbors would be endangered by the stagnation of the waters. And the Court being sufficiently advised in the premises, and it appearing further that the facts in the inquest are correct.—It is, therefore, ordered and determined, that the said Robert Owen shall have leave to build the mills on the said number seven, in township nineteen, of range twenty-five, in Macon county.

The plaintiffs proved that they erected their mill and dam at the place, on the south half of section six, which was received by the jury, and recommended by them in their inquest.

The defendant subsequently erected his dam and mill, and it was in evidence that when he raised a head of water, the plaintiff's mill was drowned.

On this state of facts, the Circuit Court instructed the jury, that so far as this action was concerned, the right of the defendant to build and enjoy his mill, was superior to that of the plaintiffs, and would protect him against an action for nuisance arising from such building, unless the fourteen dollars and fifty cents were assessed for the interest of the plaintiffs, on their mill shoal, or something connected with it.

The plaintiffs excepted to this charge. Other evidence was before the jury, and other charges given, which it is unnecessary to set out, as the opinion of the Court turns on that already stated.

PECK, for the plaintiffs in error, cited *Hendricks v. Johnson*, 5 Porter, 208; and *Johnson v. Hendricks*, 6 Porter, 472; *Aikin's Digest*, 324; *ib.* 2d. ed. 577.

CAMPBELL, *contra*.

GOLTHWAITE, J.—1. The relative rights of different proprietors of the soil to the use of water flowing by the same

stream, through their respective domains, was considered by us in the case of *Hendricks v. Johnson*, 6 Porter, 472.

In the case now to be examined, it appears that the plaintiffs occupy a position on the stream more favorable than is possessed by the defendant, inasmuch as they are nearer to its source. The former have, therefore, a right to a remuneration for the damages they have sustained by the act of the latter, in overflowing their mill, unless this right has been divested in the manner allowed by the statute.

The defendant insists that such is the effect of the proceedings had in the Orphans' Court of Macon county, on the writ of *ad quod damnum*, sued out at his instance. We think, however, that no right whatever, has been vested in him: and for two reasons: first, the inquest of the jury and the judgment of the Court, is entirely too indefinite. The inquisition returned with the writ, certifies that the jury examined a mill shoal, according to the order granted, and gave him leave to erect a set of mills on number seven, of township nineteen, of range twenty-five, in Macon county. The judgment of the Court is not more definite. It is perfectly clear that this grant, if available at all, gives to the defendant the privilege of erecting his mills at any place on the creek, within the compass of one mile, as that is the length of a section of land. We do not consider the statute as authorising the Orphans' Court, to make so indefinite a grant.

The 4th section of the act of 1812, which prescribes the mode to be pursued, when the applicant for the writ of *ad quod damnum* is the owner of the land on both sides of the stream, refers to the first and second sections of the same act. These, when examined, are found to contain precise directions, with respect to the location of the abutments for the mill, where the applicant is not the owner of the lands on both sides. The jury is to view the lands proposed for the abutment, and to locate and circumscribe by certain metes and bounds, one acre thereof, having due regard to the interest of both parties. Aikin's Digest, 324. We have already held, in the case before cited, that the act referred to, not only confers, but also divests rights; and it is in many cases, of much importance, that the precise location of the mills proposed to be erected, should be ascertained, as otherwise, collisions might frequently happen

between contiguous proprietors, especially, when the descent of the stream is great within a short distance. The location then, in our opinion, should be ascertained, either in the inquest or by the judgment of the Court, with sufficient certainty of description, to enable a surveyor to find it.

Second. The proceedings at the instance of the defendant, were commenced, by issuing the writ on the 7th day of September, 1836. This writ was returnable to the then next stated term of the Orphans' Court, but was not then returned, nor was any further proceedings had on it by the Court, until the first Monday of February, 1837. In the mean time, the plaintiffs had proceeded without delay, and after the defendant might be presumed to have abandoned his application, by reason of his delay in prosecuting his writ. We entertain no doubt that the prior application, if prosecuted without delay, would have conferred the right; indeed, it was so determined in the case of *Hendricks v. Johnson*, before cited; but here, the defendant voluntarily abandons his writ, and can have no claim now to be considered as having first appropriated the statutory right. It may be remarked, that the inquest taken at the instance of the plaintiffs, designates the location of their mills at the lower shoal on the creek, in the south half of section six.

This leads to the conclusion that the Circuit Court erred in instructing the jury that the right of the defendant was superior to that of the plaintiffs.

For this error, the judgment is reversed, and the case remanded.

ICE v. MANNING.

1. A recital or memorandum copied into the transcript sent to the appellate Court, but which does not appear to have been a part of the record in the inferior Court, will not be so regarded on error.
2. A writ issued against two, but was executed on one only; the judgment entry recites that the parties came by attorneys, "and the defendant withdraws his plea," and a judgment was rendered against the *defendant*, without designating him by name: *Held*, that it must be considered as a judgment against the defendant only, who was served with process.

Writ of error to the Circuit Court of Marshall.

THIS was a proceeding by petition and summons at the suit of the defendant in error, to recover the sum of two hundred and thirty-five dollars and eleven cents, due by a promissory note, made by the plaintiff and one Robert Dickey. The transcript, after setting out the petition, and the certificate of the clerk that the same was filed in his Court, contains a memorandum in these words: "And on the back of the aforesaid note, is the following credit: "Received March 8, 1839, seventy-nine 50-100 dollars. R. J. MANNING."

The process was executed on the plaintiff in error, and as to Robert Dickey, was returned "not found." A judgment was rendered as follows:

"R. J. Manning v. Robert Dickey & Andrew Ice.

"Came the parties by attorneys into Court, and the defendant withdraws his plea by him heretofore pleaded, and now says nothing in his defence. It is, therefore, considered," &c.

Ice alone sues out a writ of error, and here assigns for error: *First*, that the judgment was rendered for more than was due. *Second*, that although both the defendants in the summons appeared, yet judgment is rendered against only one, without distinguishing which one.

HOPKINS, for plaintiff in error.

No counsel appeared for defendant.

COLLIER, C. J.—In respect to the evidence of a partial payment upon the note, as shewn by the transcript, it cannot

be regarded as a part of the record, but it must be considered, as it doubtless is, a mere memorandum of the clerk, copied from the note on file in his office. This is indicated as well from the absence of any statement connecting it with the record, as from its entire dis-connection with any thing preceding or following it.

The commencement of the judgment entry, would seem to show that both the defendants sued, did appear, and upon the recital of the fact, a judgment against both would have been regular. *Gilbert, et al. v. Lane*, 3 Porter's Rep. 267. But the succeeding part of the entry limits the generality of the terms employed, and taken in connection with the sheriff's return, shows what parties appeared, and against which of the defendants the judgment is rendered.

In *Rivers v. Loving*, 1 Stewart's Rep. 395, the writ issued against two, and was executed on one only. The declaration was against both, and plea by "the defendant," in the singular number, without distinguishing which, and issue thereon; the Court held, that it was only the appearance of the defendant served with process. True, this case is not precisely analogous to the one at bar, yet in principle, it is not distinguishable.

If the second error assigned were fatal to the judgment, it would not avail *here*, for it asserts that the judgment is so uncertain, that it cannot be known against whom it is rendered. If this be the case, how could the defendant have sued out a writ of error, does not that writ issue upon the allegation, that he is injured by the judgment against him; and if the judgment were so uncertain, as it is insisted to be, the writ of error should be dismissed, and the defendant be left to his *superse-deas*. But we think the plaintiff in error is the party who is to satisfy the judgment of the Circuit Court; and consequently it is affirmed.

BRUMBY v. SMITH.

1. Where a workman agrees to complete the carpenter's work on a house, and to receive a certain sum on the completion of the work—his employer furnishing the materials—and the house and materials were destroyed by fire, without the fault of the workman—the house being in the possession of the employer, *Held*, that the workman could not recover a *pro rata* compensation for the work actually done.

Error to the Circuit Court of Montgomery county.

THIS was an action of assumpsit commenced in the Court below, by the defendant in error against the plaintiff in error.

The declaration contains a special count upon an agreement between the parties, and the common counts. The defendant below demurred to the special count of the declaration, which being overruled by the Court, the jury under the general issue, found a verdict for the plaintiff below. Pending the trial, a bill of exceptions was taken to the opinion of the Court, by which it appears that an agreement between the parties in writing was offered in evidence, by which the defendant in error agreed to complete the carpenter's work on a house of the plaintiff in error, for the sum of four hundred and thirty-seven dollars, to be paid when the work was completed; the materials to be furnished by the plaintiff in error.

It was proved, that a short time before the work might have been completed, the house was destroyed by fire; the materials having been furnished by the defendant below. Evidence was also offered, conducing to show that the defendant below, who was in possession of the house, caused the burning of the house by his neglect.

Upon this testimony, the defendant below moved the Court to charge the jury, that if they believed from the evidence, that the plaintiff had contracted according to the terms of the agreement, and that all the work specified in the agreement had not been done according to its terms, that the plaintiff could not recover for the work actually done by him, unless he had been prevented from the performance of it by the burning of the

house and materials; they must also believe from the evidence, that the burning was occasioned by the acts or neglect of the defendant, or that the plaintiff could not recover for the work actually done; which charge the Court refused to give, and charged that if the jury believed that a portion of the work had been executed by the plaintiff according to the terms of the contract, by which the defendant was to furnish the materials, that the plaintiff was entitled to recover the worth of the work actually done by him, on the materials so furnished, although the whole of the work specified in the contract, had not been completed; and under the state of facts above supposed, the circumstance of the burning of the house, or materials before the completion of the work, whether the fire was occasioned by the act or neglect of the defendants, or by any other means, without his agency, could not affect the right of the plaintiff to recover. To the refusal to charge, and to the charge given, the defendant excepted, and now presents the questions of law which arise thereon, to this Court for revision.

GOLDTHWAITE, for the plaintiff in error, insisted that by the contract, the defendant in error was not to be entitled to compensation until he completed the work, unless prevented by the act of the plaintiff in error. He cited 3 Taunt. Rep. 52; 6 Term Rep. 321; 7 ib. 381; 9 Barn. & Cress. 92; 8 East, 438; 2 Salk. 65; Chitty's Con. 273, 9 Mass. 78; 2 Mass. 155; 5 ib. 395; 4 ib. 101; 8 Cowen, 457; 4 Conn. 3; 2 Penn. 454; Chitt. 131-273; 10 East, 530; 2 Camp. 57.

DARGAN, contra, cited Story on Bailments, 285; 3 Burr. Rep. 1892; 2 ib. 882; 3 Johns. Rep. 518.

ORMOND, J.—As no objection was made to the judgment of the Court overruling the demurrer to the first count, we have not thought it necessary to examine it.

It is certainly true, that when by the terms of a contract, a given duty is to be performed, the performance is a condition precedent, and although performance may be prevented by inevitable accident, a *pro rata* compensation cannot be recovered for the services actually performed. Of this principle, the case of Cutter v. Powell, 6 Term Rep. 320, furnishes a full illustration.

The facts were, that Cutter shipped on board a vessel, as second mate, and received from the master the following obligation: "I promise to pay Mr T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the ship Governor Parry, from hence to Liverpool." During the voyage, and before the ship arrived at Liverpool, Cutter died, and the action was brought by his administrator, to recover the value of the services actually rendered. The Court held, he could not recover on the ground, that performance was by the terms of the contract, a condition precedent to a recovery, and that it was no answer to the objection that he was prevented by inevitable accident from performing his contract.

So, if a workman undertakes to build a house, to be paid on its completion, he cannot demand payment until he has complied with his contract, by building the house, and if it should be destroyed by inevitable accident, it will be his loss.

In this case, it was contended by the counsel for the defendant in error, that this was distinguishable from the class of cases we have been considering; that it was the hire of labor and services, as the employer was to furnish the materials, and that, "if while the work is doing, the thing perishes by internal defect, by accident or superior force, without any default of the workman, the latter is entitled to compensation to the extent of the labor actually performed."

Judge Story, in his work on Bailment, at page 278, admits that the rule is as above stated, by the civil law, where there is no contract postponing the time of payment to the completion of the work, and such he intimates would be the rule at common law; that such is the rule of law, is shown by the case of *Menetone v. Athawes*, 3 Burrows' Rep. 1592, which was an action by a ship-wright, for work and labor done, and materials found, in repairing the defendant's ship. The facts were, the ship was in the dock of the plaintiffs, to be repaired, and when only three hours work were wanting to complete the repairs, a fire happened in an adjacent brew house, was communicated to the dock, and the ship was destroyed. The dock belonged to the ship-wright, and the owner of the ship had agreed to pay £5 for the use of it. The plaintiff obtained judgment. In that case, it is to be observed, there was no contract to per-

form the work at a specific price, and the recovery was had on the implied promise to pay the value of the work and labor, and materials furnished. In this case, the defendant in error agreed to complete the carpenter's work on a house of the plaintiff in error; the materials to be furnished by the plaintiff in error, in consideration of which, he agreed to pay the defendant in error four hundred and thirty-seven dollars, "*to be paid when the work was completed.*" A few days before the completion of the work, the house was consumed by fire, whilst the plaintiff in error was in possession.

Here there was an entire contract, and although it was labor to be performed on materials furnished by the employer, yet by its express terms, the labor was not to be paid for until the work was completed; and if this is rendered impossible, without the act of the employer, there can be no recovery for the work actually done.

Mr. Justice Story, after examining this question at some length, comes to the same conclusion. "It would seem (he says) that by the common law, in such a case, independent of any usage of trade, the workman would not be entitled to any compensation; and that the rule would be, that the thing should perish to the employer, and the work to the mechanic; for the contract by the job would be treated as an entirety, and should be completed before the stipulated compensation would be due." Story on Bailment, 278; sec. 426, b. 2d edition.

From these considerations, it appears that the Judge erred in his charge to the jury, and the judgment is, therefore, reversed, and the cause remanded.

CUNNINGHAM V. GREEN.

1. A Justice of the Peace has the power to supply the loss of any paper relating to a cause pending before him.
2. A complaint in a suit for a forcible entry, is not insufficient, because it seeks to recover a *messuage*, with the *appurtenances*, known as the *South half of Section twenty*. Such a description of the land is ample; and the judgment, if a recovery is had, may be to recover the *half section*; as that is the name by which the messuage is known.
3. An allegation of *seizen in fee* in the plaintiff, and an assertion that the defendant entered and disseized, and put out the plaintiff from the peaceable possession of the lands described, is a sufficient averment of possession.
4. The defendant in an action for a forcible entry, can not introduce evidence to shew that the land in controversy is a part of the public domain, for the purpose of contradicting the allegation of the plaintiff that he is seized in fee.
5. Nor is such evidence admissible to show that the plaintiff was not in possession at the time of the entry. The fact, if admitted, has a tendency to elucidate the question as to the possession, which is alone in issue.

Writ of error to the Circuit Court of Macon county.

ACTION of forcible entry, commenced before a justice of the peace. The plaintiff had judgment, and afterwards the defendant removed the case, by *certiorari*, into the Circuit Court, where he assigned for error, that the justice of the peace erred,

1. In admitting the plaintiff to substitute a complaint; the substituted paper not purporting to be a copy of the original.

2. In excluding evidence offered by the defendant, to prove the land in controversy was a part of the public domain.

3. In rendering judgment on an insufficient complaint.

4. In rendering judgment on a verdict not responding to the issue.

5. Because the verdict and judgment should have been in favor of the defendant.

The Circuit Court affirmed the judgment, and the defendant assigns as error, that it should have been reversed.

The record shows that the plaintiff on the day of the trial before the justice, made, signed and filed a complaint, in which he alleges that he "on the 7th December, 1839, was seized in fee of a certain messuage, with the appurtenances, lying and situate in the county of Macon, and State of Alabama, known

as the south half of section twenty, in township sixteen, of range twenty-two, and being so seized thereof, the defendant afterwards, on the same day, at the county aforesaid, with force and arms, unlawfully did enter, and him the said plaintiff, from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there, with force and arms, and with strong hand, unlawfully did disseize and put out," &c. On this complaint, the justice indorsed: "This complaint, filed in my office this day, but one of the same nature was filed previous to the third day of January, 1840; I mean by the word return, the plaintiff filed his complaint, saying that the defendant had trespassed as mentioned, on the land as described within, and that said lands were his."

The defendant objected, in writing, to the substitution of the complaint, which appears for the original; but the objection was overruled. The defendant then pleaded the general issue.

After the plaintiff had introduced his evidence, the defendant offered proof, to show that the lands described in the complaint, was a part of the public domain; this was offered in evidence to controvert facts alleged by the plaintiff, and in order to justify the taking and continuing in possession of the said half section, which the plaintiff was not in the actual possession of, and which he had not subdued. The plaintiff objected to this evidence, and the justice of the peace excluded it on the ground that it would be inquiring into the merits of the title.

The jury found for the plaintiff in general terms, and the justice rendered judgment, that he recover of the defendant the possession of the said half section of land, and the costs.

BASCOM, for the plaintiff in error, insisted that the paper substituted, was not shown to be a copy of that stated by the justice to be mislaid, and the law does not warrant the course pursued in this case.

If, however, the justice of the peace could authorise a substitution, the complaint is insufficient, as it does not allege any possession of the land by the plaintiff, and the said messuage will not include, nor does it mean a half section of land. Admitting that this action will be to recover a messuage, it does not follow when such is declared for, that a judgment can be rendered for the recovery of land.

The evidence rejected was admissible; it was offered to counteract facts alleged by the plaintiff; he alleges seizen, and this might be either a seizen in fact or in law; if the latter, then an actual possession of part, might be extended to cover all for which he had title, and in such a case the defendant was authorised to controvert the fact, by shewing title in the United States. *People v. Nelson*, 13 Johns. 340.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. A justice of the peace has the same power to supply the loss of any paper relating to a cause pending before him, as is possessed by other Courts. In *Dozier v. Joyce*, 8 Porter, 303; this power is said to be inherent in all Courts, and it results from the necessity, that Courts shall proceed unimpeded by accident or design, to the final disposition of all suits, on their merits. We will presume the justice of the peace was satisfied that the complaint filed at the trial, did not materially differ from the original; which he states to have been mislaid.

2. It is insisted, however, that this complaint is insufficient in law, because it seeks to recover a messuage, with the appurtenances, known as the south half of section twenty, &c.—We apprehend this objection savours of much subtlety, for however it may be true, that land cannot pass as appurtenant to land, it is very certain that a messuage may be known by one name as well as another, and therefore, we consider the description of the premises sought to be recovered, as amply sufficient. The judgment drops the term messuage, and determines that the plaintiff shall recover possession of the land by its other description; but in so doing, does not, as supposed by the defendant, depart from the complaint.

3. The complaint is said to be also defective, in not alleging positively and directly, that the plaintiff was in possession of the premises sought to be recovered. This objection is not sustained by the complaint, because, in addition to the allegation, that the plaintiff was seized in fee, it is also asserted, that the defendant entered with force and arms, and unlawfully put out and disseized the plaintiff from the peaceable possession of the lands described. This we consider as a positive averment,

that the defendant was in possession of the lands described, at the time of the unlawful entry.

4. The principal question, and the only one perhaps, on which much reliance has been placed, is that raised by the exclusion of the evidence offered before the jury.

It sometimes happens, that the primary Courts are much embarrassed by the production of evidence, which seems to them as introducing a question of title, when in reality, the only object and effect of the evidence is, to show the manner and extent of the possession. In this case, it is said, the evidence offered was introduced for the purpose of controverting facts alleged by the plaintiff; and in order to justify the taking and continuing in possession of some portion of the half section of which, the plaintiff was not in the actual possession at the time of the entry. The allegation of seizen in fee, was unnecessary to be proved, as is shewn by the case of *Lecatt v. Stewart*, 2 Stewart, 474. The only matter in issue in such cases as this, is the possession, and it is immaterial whether it is connected with title or otherwise. The evidence was then, inadmissible, for the purpose of controverting this allegation, because, if it is permitted to be disproved, a question is made which involves the title, in direct opposition to the words of the statute.

5. It was equally inadmissible to show the fact of title being outstanding in the United States, as a justification of the entry. The plaintiff must have proved *a possession*, either actual, by having the land under his immediate control and dominion; or constructive, by being in the possession of a part of the tract, under color of title for the whole. Now, if the record in this suit had declared that the plaintiff made proof of his possession by the latter mode; it is apparent that the evidence offered by the defendant, had no tendency whatever, to disprove the case as made. It does not follow, because the United States is the owner of the land, that the plaintiff may not have had the possession; nor could the jury be led to any conclusion, proper to this case, by such evidence. It was, therefore, properly rejected.

No error is shewn in the record, and the judgment of the Circuit Court is affirmed.

DAVIS AND BLACK V. WHITE.

1. The act of 1824, "concerning prisons and prisoners," requires a prison-bonds bond, taken on process issued by a Justice of the Peace, to be filed in the Clerk's office of the County Court; and requires that Court, on motion, to grant judgment and award execution against the obligors; consequently, the Justice of the Peace has no right to entertain proceedings upon such bond.

Writ of error to the Circuit Court of Barbour.

Mr. PECK, for the plaintiffs in error.

No counsel appeared for the defendant.

COLLIER, C. J.—A *capias ad satisfaciendum*, being issued by a Justice of the Peace of Barbour, against the body of George Rowlin, he was arrested by a constable, and committed to the jail of that county; thereupon, the prisoner executed a bond, with Elisha Davis, his surety; conditioned to keep the prison bounds. This bond was endorsed, "forfeited," by the jailor; whereupon, the Justice who issued the *ca sa*, immediately issued a summons to Rowlin and Davis, to appear before him, and shew cause why execution should not issue against them, on the judgment in favor of the defendant in error. On the return of the summons, the Justice rendered a judgment against Davis, from which he appealed, and executed a bond with Black, as surety; conditioned, for the successful prosecution of the appeal in the Circuit Court of Barbour. The Circuit Court having given a judgment against the defendant and his security, they, joined in a prosecution of a writ to this Court

The statute is explicit in requiring that where a prison-bonds bond is taken, in consequence of process issued by a Justice of the Peace, the "same shall be filed in the clerk's office of the County Court;" and that "it shall be lawful for the Court, where such bond is lodged, upon motion of the party for whom such execution issued, to grant judgment and award execution against such person and his securities, &c., for the debt or damages, and costs," &c. Aik. Dig. 351.

There is no statute which authorizes the proceeding before

the Justice of the Peace: The Circuit Court should have quashed it, and for entertaining the cause, its judgment is reversed.

THOMPSON V. WALLACE.

1. Where an execution is returned, satisfied, the judgment is discharged; and if garnishee process is afterwards issued against a debtor of the defendant in execution, it will be quashed, on producing the execution returned satisfied.
2. Where an execution has been levied, and the plaintiff is satisfied, by payment received through a stranger, who lends the money to the defendant in execution, the judgment can not afterwards be the foundation of garnishee process.

Writ of error to the Circuit Court of Autauga county.

GARNISHEE process issued on affidavit of a stranger to the judgment under the provisions of the act of 1818. (Aikin's Digest, 213, s. 1.)

The garnishee appeared, and moved to quash the garnishment, because an execution issued on the judgment, had been returned satisfied, and the money paid over to the plaintiff before the process in this case was issued. The plaintiff then proved by the sheriff, that the property of the defendant in execution was levied on to satisfy the execution, which he afterwards returned; that one Amos C. Baker, gave to the defendant a draft on the sheriff for one thousand dollars, then owing to him by the sheriff, and the defendant transferred certain notes to said Baker, as collateral security for the said draft. The sheriff took up the draft, and received the remaining portion of the sum due from the defendant. He afterwards paid the plaintiff, the entire amount of his execution. It was also proved, that when the draft was given, that Baker requested the sheriff to keep the execution open. It was further proved, that the plaintiff afterwards assigned the judgment to said Baker. On these facts being disclosed, the plaintiff moved the Court that the sheriff might be allowed to amend his return on the execution, to correspond with the facts stated; which was re-

fused by the Court, and the garnishment was quashed. The defendant excepted to this course, and at his instance, a bill of exceptions was signed and sealed. He now assigns for error, that the Circuit Court erred in quashing the garnishment; and also, in refusing to allow the sheriff to amend his return.

CAMPBELL, for the plaintiff in error.

HARRIS, contra:

GOLDTHWAITE, J.—1. The judgment was discharged by the satisfaction of the execution, and no garnishee process could properly issue on it. The garnishee, when called in Court, to show cause why judgment should not be had against him, is certainly at liberty to show by the record, if it was conceded that he could not do it in any other way; that the process has been improperly issued, in consequence of the satisfaction of the judgment. This was shewn in this case, and therefore the garnishment was properly quashed.

2. The proposed amendment of the return, would not have bettered the condition of the plaintiff. The facts stated show, that the execution was in fact discharged by those who were parties defendant to it, although the money was loaned to them by another.

This seems to be an attempt to use the payment as a means to collect a debt due to the defendant in execution, in a more summary mode than can be obtained by suit in the ordinary way.

The Circuit Court very properly refused to countenance it.

Let the judgment be affirmed.

NORWOOD v. ROSSITER.

1. A promise in writing, by N and A to R, to discharge, pay, and satisfy certain debts due by R and A, as partners, is not within the act of 1818, authorizing a discontinuance, when the writ is not executed upon all the defendants and therefore, a discontinuance in such case, as to one, is a discontinuance of the action.

Error to the Circuit Court of Wilcox.

THIS action was commenced in the Court below, by attachment, by the defendant in error, against the plaintiff in error, and one Edwin Allen, on an instrument of writing not under seal; by which the latter agreed to discharge, pay and satisfy, certain debts due by the defendant in error, and the said Allen, under the firm of Rossiter & Allen. The attachment was levied on the property of the plaintiff in error alone, but the declaration is against both the plaintiff in error and Allen. A discontinuance was afterwards entered as to Allen. The plaintiff below had judgment, from which this writ of error is prosecuted by the defendant, who among other things, now assigns for error, the discontinuance of the suit:

EDWARDS, for plaintiff in error.

ORMOND, J.—The instrument sued on in this case, is not embraced in the statute of 1818, (Aikin's Digest, 267,) by its terms, as it is neither a "bond, bill, covenant or promissory note." If the question was open in this Court, we should be inclined to think this case within the equity and meaning of the statute, though without the letter; but we feel ourselves precluded from putting that construction on it, by the decision of this Court, in *Thompson v. Saffold*, (2 Stewart, 494,) and *Tindall v. Collins*, (2 Porter, 17,) which cannot be distinguished from this case. As by the common law, the discontinuance of a co-defendant who was a proper party, was a discontinuance of the entire action; and as this case is not provided for by the statute author-

ising discontinuances in certain cases, the judgment must be reversed.

TICKNOR V. THE BRANCH BANK AT MONTGOMERY.

1. In a summary proceeding, by motion, at the suit of the Bank, it is not necessary that the notice should be served thirty days before the *commencement* of the term of the Court, or that the motion should be made on any certain day, unless perhaps, the notice in this respect is special.
2. If the acceptor of a bill fails to pay it, at maturity, so that it is necessary to protest it in order to charge the drawer and endorser with damages, the acceptor is liable to refund to the holder the notarial fees.

Writ of error to the Circuit Court of Montgomery.

J. A. CAMPBELL, for the plaintiff in error.

PECK, for the defendant.

COLLIER, C. J.—Several of the causes assigned for error, were not noticed at the argument of this cause; consequently, we suppose that they were abandoned, and shall not now consider them.

The judgment entry in *Clements, et al. v. The Branch Bank at Montgomery*, (1 Ala. Rep. N. S. 50,) was adopted in the present case, and that being regular, and containing every material allegation or recital, we cannot look to the previous proceedings for an error, on which to reverse, inasmuch as it does not appear, that any exception was taken in the Circuit Court.

But if we were to scan the entire proceeding, we are not sure that we should discover any material irregularity. The notice does not indicate that the motion would be made on any certain day of the term; the plaintiff below might then have submitted it to the Court at any time after the expiration of thirty days from the period of its service. It is not necessary that a notice, at the suit of a Bank, for judgment against its debt-

or, should be executed thirty days before the *commencement* of the term of the Court; nor is it necessary that the motion should be made on any certain day; unless, perhaps, where the notice has prescribed a day on which it will be made.

In respect to a judgment for the cost of protest against the plaintiff, who was sued as an acceptor, we cannot conceive any irregularity in this. True, so far as an acceptor is concerned, no consequences result to the holder of a bill from a protest for non-payment. But it is indispensable to the holder's right to recover damages of the drawer and indorser, that he cause the bill to be protested. The failure of the acceptor to meet his engagement with promptness has imposed upon the holder this necessity, and he must be held liable to pay the holder all costs which his default has occasioned.

It would not be pretended, but that the drawer and indorser would be bound to refund to the holder, the notarial fees, and that they might look to the acceptor for reimbursement. This being the case, it is not conceived why the acceptor should not be primarily liable to the holder.

In every view of this case, we are of opinion that the judgment of the Circuit Court should be affirmed.

THE MAYOR AND ALDERMEN OF MOBILE V. YUILLE.

1. A power granted to the corporation of the city of Mobile, "to license bakers, and regulate the weight and price of bread, and prohibit the baking for sale, except by those licensed," is not contrary to the constitution of the State.
2. A by-law made pursuant thereto, may be enforced by a reasonable penalty,—to be judged of by all the circumstances of the case.
3. A penalty, to be reasonable, must be certain; a penalty, therefore, that the offender shall pay a fine not exceeding fifty dollars, to be recovered before the Mayor, &c, is void for uncertainty.
4. Whether the penalty of a by-law, which condemns to forfeiture such bread as is of less weight than the ordinance requires and exacts from the baker, as the price of his license, a sum beyond what may be necessary to compensate for issuing and registering it, can be supported—*Quere*.

Error to the County Court of Mobile.

This was a case agreed. The facts presented on the record are that the defendant in error is a baker in the city of Mobile; that a quantity of bread made by him for sale was condemned for being of less weight than required by the proclamation of the Mayor, made according to the ordinance of the Mayor and Aldermen—and fined twenty dollars. From this judgment he appealed to the County Court, which reversed the judgment of the Recorder, from which the Mayor and Aldermen prosecute this writ of error.

The ordinance of the city, relating to the assize of bread, passed the 28th of January, 1826, is part of the agreed case. The 1st section provides, that no one shall carry on the business of a baker of loaf bread within the city, without obtaining a license therefor, for which he shall pay the sum of twenty dollars, and one dollar to the clerk, for issuing the same, and for carrying on the business of baking bread in the city without such license, a fine, not exceeding fifty dollars, is imposed.

The 2d section requires all bread to be made of good and wholesome flour, and of such weight, as shall be from time to time prescribed; the loaves to be of the value of 12 1-2 and 6 1-4 cents.

Section 3d, requires all bread to be marked with the initials

of the baker's name, or in some other manner, to designate it with the price of the loaf marked thereon.

Section 4th, requires the police constables to inspect bread and to sieze all such as shall be deficient in quantity or quality, and convey the same to the Mayor's office, who shall condemn it for the poor, and may also fine the offender in a sum not exceeding fifty dollars. A second offence forfeits the license.

The 5th section, prescribes the weight of bread, on a graduated scale, according to the price of flour, and requires the Mayor to issue his proclamation as often as a change in the price of flour produces an alteration in the weight of the bread.

MR. CAMPBELL, for the Corporation, submitted the case without argument, and cited 7 Cowen, 33. 585, 12 Pickering 184; 7 Conn.; 1 Strange, 466; 1 Salk, 143; Chamberlain of London, 5 Coke.

B. F. PORTER, for defendant in error, contended:

1. The Legislature itself has no power to impose this restriction. All power which the Legislature can exercise, must be derived; 1st, from the constitution of Alabama, in direct terms; 2, from an admitted extraordinary power, to enact laws for the general good, not forbidden in the constitution—7 Porter's R. 293, 295, 296; 9 Dana, 516. 517; 5 ib. 31, 33; 3 Wheeler's C. L. 244; 10 Wendell, 99; 2 Com. Dig. 284, 290; 5 Cowen, 465; 8 Johns. R. 418; 1 Cowp. 269; 5 Cowen, 462; 1 Dana, 460; 1 Wilson 233; 1 Lord Ray. 499; 7 D. & E. 543; 3 Salk. 76—ib. 77; 12 Modern, 686, 687; Latch. 546; 1 Burrows, 16; 8 East. 185; 8 Coke, 129; Croke Eliz. 893; 1 Wm. Blacks. 372; 4 Burr. 1921; 10 Co. 31; Hob. 211; Carth. 482; 5 Mod. 439; Willes, 384; 3 Burr. 1856, 1859; 3 Salk. 193; 3 Burr. 1847; 3 Wheeler's C. L. 244, 245, 248, 249, 250, 254; 3 Inst. 81; 3 Burr. 1862; 4 Black. 159; 1 Hawk. P. C. 231; 1 Burr. 14; 5 Cowen, 452; 3 Burr. 1862; Puffend. b. 8 ch. 5; Vattel, b. 1, ch. 20, sec. 246; Dana, 516; 9 ib. 517; 5 ib. 31; 1 Burr. 14, 16, 17.

2d. The Legislature, if it hath such power, cannot delegate it. It is a sovereign power, if any. The Legislature can delegate to individuals a right to do particular acts, power to do which themselves, is incident to sovereignty. These last may

be carried out by its own officers, but cannot be vested in the discretion of others: (1 Dana, 459; 3 Salk. 76.)

3. When a power can be exercised and delegated, it must be strictly pursued. Here, the power granted is to license. The demand of a license closes the power; and the price of the license is all the corporation can recover. 2: Const. R. of So. Car. 726; 1 Bay, 46, 382; 5 Cowen, 465; 4 Burr. 2204; 4 Inst. 49; 2 Cranch, 127; 2 Johns, 109, 115; 5 Porter 279.

ORMOND, J.—The question presented on the record is, whether the Corporation of the city of Mobile had authority to pass the ordinance regulating the assize of bread.

The power to make by-laws is incident to every corporation, and it is therefore unnecessary to confer the power by express grant in the charter. If the validity of a by-law is questioned, the test is whether it is reasonable and consonant to the general law of the State. By an act of the Legislature, passed 17th December, 1819, the inhabitants of the city of Mobile, were incorporated.

The 7th section confers the power to make all necessary police regulations, and to pass all by-laws necessary for the government of the city; "to license bakers and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed:" Toulmin's Digest, 787. The question then is, whether the Legislature had power to authorize the corporation to make such a by-law, and whether the power so conferred has been pursued.

It is strenuously contended by the counsel for the defendant in error, that no such power exists, because, as he contends, it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate. Doubtless, under the form of government, which exists in this and the other States of this Union, the enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare, is guarantied to every man, and no restraint can be lawfully imposed by the Legislature in relation thereto, which the paramount claims of the community do not demand, or which does not operate alike on all. Free government does not imply unrestrained liberty on the part of the citizen, but the privilege of being governed by

laws which operate alike on all. It is not therefore, to be supposed, that in any country, however free, individual action cannot be restrained, or the mode, or manner of enjoying property, regulated.

The decision of this Court, in the matter of *J. L. Dorsey*, (7 Porter, 295,) has been referred to, as sustaining the position that the act is unconstitutional. But the ground upon which the law in that case was held to be void, was not that the Legislature could not regulate the matter and provide for the licensing attorneys at law, but because the act was partial, and did not operate alike on all the citizens of the State. Thus, Judge *GOLDTHWAITE* holds this language: "As the constitution is silent with respect to the pursuits of business or pleasure, the General Assembly has the power to prescribe any qualification not inconsistent with the rule that equality of right, must be preserved. In other words, that any citizen may lawfully do what is permitted to any other. It rests with the legislative power, to prescribe the conditions on which any avocation or calling shall be pursued, so that the door is closed to none; and there seems to be no other limit to their discretion, than the one which arises from the first section of the bill of rights referred to:"—361 2, 7 Porter.

There is no motive, however, for this interference on the part of the Legislature with the lawful actions of individuals or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people.

Upon this principle, in this State, tavern keepers are licensed and required to enter into bond, with surety, that they will provide suitable food and lodgings for their guests, and stabling and provender for their horses; and the County Court is required, at least once a year to settle the rates of inn keepers. Upon the same principle, is founded the control which the Legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads and other kindred subjects. So, also, all quarantine and other sanitary regulations, all laws requiring houses to be built in cities of a certain material, to guard against fire, depend for their validity on the same principle.

It has been strongly urged that this by-law is in restraint of trade, and therefore void by the common law. A contract of an individual, not to exercise a particular trade or calling in the kingdom, is void, but if on sufficient consideration, is good, if confined to a particular place; so a by-law restraining trade generally, is bad, but if made for the regulation of trade in a particular place, is good. For proof of which, a number of instances are given by Chief Baron Comyn, in his Digest, (2 vol. 286, by-law: B. 3.) and among them is, "that such a baker bake white bread only, such an one, brown." The rule and the reason of it, are laid down with great perspicuity in the great case of *Mitchell v. Reynolds*, (2 P. Williams, 181,) by Lord Macclesfield. "All by-laws made to cramp trade in general, are void. By-laws made to restrain trade in order to the better government of it, are good in some cases, viz: if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. or for the advantage of the trade and improvement of the commodity." The learned Judge afterwards shows that this modified restraint is consistent with *Magna Charta*. See also the following cases in which such regulations have been held good. *Fugakerly v. Wellshm*, 1 Strange, 463; *King v. The Chamberlane of London*, 3 Burrows, 1322; *Wennell v. Chamb. of the city of London*, 1 Stra. 675; *Pierce v. Batrum*, Cowp. 269. *The Master Wardens, &c. v. Fell*, Willes' Rep. 384.

The sum of these authorities is that though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent restrained in a particular place, if such restraint be for the good of the inhabitants, as when for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where it is for the advantage of the trade and improvement of the commodity.

The regulation in this case seems to combine all these qualities. Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shewn that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the vol-

untary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight, the consequence of which would be to drive the baker from the trade.

The case of *Dunham & Daniels v. The Village of Rochester*, 5 Cowen 462, was considered by the counsel for the defendant in error as conclusive in his favor. The by-law of the town of Rochester, which was called in question in that case, assessed a tax of from five to thirty dollars for a license from all grocers, hucksters, &c., and imposed a penalty for selling without such license. The action was for the penalty for selling without license. The charter of the town authorized the trustees, &c. "To make all such prudential by-laws, rules and regulations as they from time to time, may deem meet and proper, and particularly such as are relative to the public market, &c: &c. relative to taverns, gin shops and *huckster shops* in said village."

The Court held this by-law to be bad on the ground that the authority of the corporation was not to pass what laws they pleased, but such as were *prudential*. The Courts say, "admitting the power to limit or prohibit altogether, the erection of huckster or gin-shops, if required by prudence for the good of the corporation, it is not shewn how they could be an evil if conducted under proper regulations, *nor can we see judicially, that any restriction was necessary*. For all the purposes of jurisdiction, corporations are like the inferior Courts, and must shew the power given them in every case."

It appears from these extracts, very conclusively, that the decision of the Court proceeded on the ground, that the by-law in question was void from an excess of authority,—that it did not judicially appear that it was a *prudential regulation*. But in this case, the power is expressly given by the statute to do the act complained of, and in the case just cited from 5 Cowen, it appears that the Trustees of the town of Rochester, were authorised by the act of incorporation, to pass by-laws regulat-

ing the assize of bread; and are prohibited from fixing the price of any commodity or articles of provision, except the *article of bread*, that may be offered for sale.

The legislature having full power to pass such laws as is deemed necessary for the public good, their acts cannot be impeached on the ground, that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day. The laws against usury, and quarantine, and other sanatory regulations, are by many considered as most vexatious and improper restraints on trade and commerce, but so long as they remain in force, must be enforced by Courts of justice; arguments against their policy must be addressed to the legislative department of the government.

If, however, such an inquiry were open, it would be very difficult to satisfy this court, that the *assize of bread* in a populous city or town, is an unwise regulation. The practice has prevailed too long, and has been too generally, not to say, almost universally acquiesced in, and continued, to permit us to doubt, that some regulation on this interesting subject, is necessary and proper.

It is also insisted, that admitting the legislature to possess the power, it cannot be delegated to a corporation. We have seen that the mere creation of a corporation, carries with it the power to make all by-laws, which are reasonable and not contrary to the general law of the State; it is also true, that an express grant to pass an unreasonable or unlawful by-law, is void; it follows, therefore, most conclusively, that the legislature may grant expressly the power to do that which the corporation might do without express grant. The test of the *by-law* being the same in either case. Wilcock on Corporations, 96. As, however, *by-laws* are the rules of action which the inhabitants of a place prescribe for their own government, there is a peculiar propriety in permitting them to be the judges of what rules are necessary and proper, and such is the constant, the invariable practice.

Finally, it is urged, that there is no power given by the act of incorporation, to inflict a penalty for the violation of the by-law. The right to make laws, necessarily implies the power of enforcing the law by some sanction, otherwise the power would

be fugatary. The supreme legislative power of a State, are the exclusive judges of the penal sanction of a law, but the penalty for the violation of a by-law, must like the by-law itself, be reasonable. The penalty in this ordinance under consideration, is not more than fifty dollars, to be recovered before the Mayor, or any one of the Aldermen; one half to the use of the city, and the other to the use of the person procuring the conviction.

What would be a reasonable penalty, cannot, from the nature of the thing, admit of a general rule, applicable to all cases, but must in every case, be determined by the nature of the offence intended to be prohibited. Some general rules, however, may be laid down as applicable to all cases. The penalty must be a sum certain, and cannot be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offence. It is also said, that although the utmost limit of the penalty be fixed beyond which the fine cannot extend, that it does not remove the objection. The reason assigned is, that it permits the corporation to be a judge in its own cause. Nor, it is said, can the penalty of a by-law extend to forfeiture of goods, unless such power be expressly given by the charter. See the cases collected by Angel and Ames on Corporations, 200; and by Wilcock on Municipal Corporations, 152, sec. 308.

The by-law in this case being not for a sum certain, but for such sum not exceeding fifty dollars, as the corporation court might think proper to impose as a fine, cannot be supported.

We also incline to doubt the propriety of that portion of the by-law which forfeits such bread as is not of the weight required by the ordinance, as also that portion which requires twenty dollars to be paid by the baker as a license, unless the latter can be supported under the taxing power of the corporation. Though doubtless the corporation could require a fee for the issuance and registration of the license.

From this view of the case, it follows that the County Court did not err in its judgment, reversing the judgment of the recorder, and it is therefore affirmed.

WILLIAMS, USE &C. V. YOUNG.

1. An instrument of writing, made 24th November, 1836, by which the defendant undertakes to make titles to a tract of land at a certain day, and in case he fail to do so, to pay a certain sum of money. is not a sealed instrument, although it concludes with "witness my hand and seal"—unless a scrawl or seal is attached to the signature. The act of 1839, (p. p. 99,) declares that such an instrument shall be taken as sealed, but this act has no retrospective operation.
2. The improper addition of a *super se assumpsit* cannot be reached by a general demurrer where it may be stricken from the declaration, and enough remain to constitute a good cause of action; but the introduction of a *super se assumpsit* can not have the effect to change the liability of the defendant, or authorise a judgment for a stipulated sum, if it is in reality in the nature of a penalty.

Writ of error to the Circuit Court of Tallapoosa county.

ACTION of assumpsit on a written instrument, described at length in the declaration. By it, the defendant, in consideration of eighty dollars, bargained and sold to the plaintiff a certain tract of land, and further agreed to make him a good title within twelve months; and in case he should fail to do so, then to pay the said plaintiff one thousand dollars. The attestation clause is in these words: Given under my hand and seal, this 24th day of November, 1836; and the signature of the defendant is attached without any scrawl or seal.

The declaration avers, that at the expiration of the time stated, a deed was tendered to the defendant by the plaintiff, to be executed by the former, which he failed to do. It also avers that the defendant did not make title to the plaintiff according to the contract, or at any other time. The declaration concludes with a *super se assumpsit* for the sum named in the instrument, and lays the breach in the non payment of the money.

The defendant demurred to the declaration; the demurrer was sustained, and the plaintiff refusing to amend, judgment was rendered against him. He now assigns this judgment as error.

HARRIS, for the plaintiff in error, cited act of 1839, P. P. 99,

Matthews v. Zain, 7 Wheat. 164; Dash v. Vanclick, 7 Johns. 477; Bloodgood v. Cammack. 5 S. & P. 276; Golden v. Prince, 3 Wash. C. C. 333; Pearl v. Womack, 3 N. H. 473.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—1. At the time when the instrument of writing, set out in the declaration, was made, it was not entitled to be considered as a sealed writing, because there was no seal, nor its equivalent, a scroll, appended to the signature. *Lee v. Adkins, Minor*, 187. The declaration in assumpsit is, therefore, the proper one, unless the remedy is changed by the act of 1839. This directs, that all covenants, conveyances, and all contracts in writing, which import on their face to be under seal, shall be taken, and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scrawl to the name of the party or parties or not. P. P. 99. It is of very little importance in the aspect on which this case is presented, whether the plaintiff has his remedy by action of assumpsit or covenant; but if more time had elapsed, the construction of the statute of 1839, might materially affect the rights of the defendant; and we apprehend either party can properly insist that it shall receive such a construction as will not affect pre-existing contracts.

If the remedy alone was affected by this enactment, no injury could arise by giving it a retrospective operation; but such does not appear to have been the intention of the legislature; the mischief was, that instruments similar in appearance, produced different legal consequences, by the addition or omission of a very unimportant matter; this was intended to be remedied, and full effect can be given by a prospective operation. If it is retrospective in its operation, then it is evident, that in another condition of time, the defendant's right, under the statute of limitations, would be affected; it is also evident, that by such a construction, the plaintiff's action would be changed from assumpsit to covenant or debt. We are satisfied that the statute has no other than a prospective operation; and, therefore, the action of assumpsit was the proper one on this instrument.

2. There is but little question that the introduction of the

super se assumpsit in this declaration, is improper, according to the strict rules of pleading, because, a legal obligation to pay the sum stipulated, did not arise from the promise contained in this contract; we think it is probable that the plaintiff is only entitled to the value of the land, as the proper measure of damages; without, however, undertaking at this time to decide this question, it can be said, that whatever may be the true measure of damages, the improper introduction of the *super se assumpsit*, cannot be reached by a general demurrer, in those cases where it can be stricken from the declaration, and enough remain to constitute a good cause of action. *Castles v. McMath*, 1 Ala. Rep. N. S. 326; *Evans v. Watrous*, 2 Porter, 205. But the introduction of a *super se assumpsit*, cannot have the effect to change the liability of the defendant, or authorise a judgment for a stipulated sum, when that, in reality, is in the nature of a penalty.

If the *super se assumpsit* clause is stricken out of this declaration, enough remains to constitute a good cause of action, as it contains the contract. and a sufficient averment of its breach. Let the judgment be reversed, and the case remanded.

MURRAY, ADM'R. V. EZELL.

1. In the condition of a bond, executed to remove by appeal, a case of the trial of the right of property, from a Justice of the Peace to the Circuit Court, it was recited that sundry executions had been levied on the property in question—*Held*, that it could not be intended, that the cases had been consolidated by the Justice, but the reasonable inference was, only one had been tried, or appealed from.
2. Whenever a claim to property levied on, has been interposed in due form, the constable is released from damages at the suit of the claimant.
3. Where the claimant on the trial of the right of property, before a Justice of the Peace, appeals to the Circuit Court, the constable should deliver to him the property, and if instead of doing this, he sells it under a bond of indemnity from the plaintiff in execution, the bond is void, as the consideration requires the doing of that which is against law. The constable and plaintiff are joint trespassers, but as a verdict for the latter, on the trial of the appeal, would not be evidence in an action by the claimant against the constable, the constable is a competent witness for the plaintiff.
4. Where a case, of the trial of the right of property, is removed from a Justice of the Peace to the County or Circuit Court, on the trial of the appeal, the execution is admissible evidence, without producing the judgment.
5. Although the claimant of property is inhibited from withdrawing his claim, the plaintiff in execution may submit to a non-suit.

THIS was a trial of the right of property, originally tried before a justice of the peace of the county of Pickens; the claimant being there unsuccessful, she brought her case into the Circuit Court of that county. An issue was there made up, and the case tried *de novo*. On the trial, the presiding Judge sealed a bill of exceptions, at the instance of the plaintiff in execution.

From the bill of exceptions it appears, that when the cause was called for trial, the death of Wilder, the original plaintiff, was suggested, and Elijah Murray, his administrator, made a plaintiff in his stead; whereupon the plaintiff moved the Court to quash the appeal bond, which motion was overruled, and he excepted.

The plaintiff then called as a witness, A. H. Morgan, who being examined by the defendant, stated that he had no interest in the event of the suit, of which he was aware; that he was the constable who levied the execution on the property in

controversy; that after the trial of the right of property before the justice of the peace, and an appeal to the Circuit Court by the claimant, he had (as constable) upon being indemnified by the plaintiff, sold the property levied on; whereupon, the defendant moved, that Morgan be excluded as a witness, which motion was granted, and the plaintiff excepted.

The plaintiff then proposed to read to the jury, the executions which had been issued by the justice of the peace, and levied on the property in question; to this evidence the defendant objected—her objection was sustained; and thereupon the plaintiff excepted.

The plaintiff offered no further evidence, but proposed to take a non-suit, which being objected to, by the defendant, who insisted on a verdict, the Court overruled the proposition; whereupon the plaintiff excepted.

The jury returned a verdict in favor of the defendant, and judgment being rendered thereon, the plaintiff has sued a writ of error to this Court, and here assigns for error: *First*, the refusal to quash the appeal bond. *Second*, The exclusion of Morgan as a witness for the plaintiff. *Third*, the rejection of the executions as evidence; and *Fourth*, the refusal of the Court to permit the plaintiff to take a nonsuit.

CRABB & WM. COCHRAN, for the plaintiff in error.

ELLIS & J. L. MARTIN, for the defendant.

COLLIER, C. J.—It was argued for the plaintiff in error, that the Circuit Court should have dismissed the appeal; because it appears from the condition of the appeal bond, that there were several cases of the trial of the right of property, between the parties, which before the justice of the peace, were determined adversely to the claimant, and that an appeal was granted in all the cases upon the execution of one bond.—This argument is not sustained by the record. True, the condition recites that “sundry executions” were levied on the property in question, yet it appears that the claimant appealed but from one judgment. It cannot be intended that the justice directed a consolidation of the cases before him; the most natural inference would seem to be, that but one of the cases had been tried, or if all had been tried, but one had been appealed from.

Whenever the claim of property was interposed; the constable was released from all damages at the suit of the claimant, so that the question, whether he has subjected himself to an action, must depend upon the regularity of his subsequent proceedings; that the constable in the present case has been guilty of a breach of duty, is apparent from the record. When the claimant appealed from the judgment of the justice to the Circuit Court, he was entitled to the possession of the property levied on; but instead of giving it up, the constable sold it, upon receiving a bond of indemnity from the plaintiff in execution.

The consideration of that bond is not such as the law will recognize. It is an indemnity for declining to perform official duty, and acting in direct violation of law. In this view of the question, the execution of the bond can have no influence in determining the competency of the constable as a witness. He must be regarded as a wrong-doer, without indemnity in having sold the property after the appeal.

Morgan and the plaintiff in execution, were then joint trespassers—the one in having sold the property, and the other in having incited to the act of selling. No judgment which might have been rendered in the present case, could be used as evidence against Morgan, in a suit by the claimant against him—he must be charged or excused by other proof. 1 Phil. Ev. 51; 3 Phil. Ev. 817–919; 2 Phil. Ev. 107, C. & H. ed. Such being the relation of the constable to this cause in the Circuit Court, he was a *competent* witness.

In *Carlton et al. v. King*, 1. Stewt. & Porter's Rep. 472, it was held that where a case of the trial of the right of property, is taken by appeal from a justice of the peace to the Circuit or County Court, the execution issued by the justice is admissible evidence, without producing the judgment. This is a conclusive authority to show, that in the case at bar, the executions were improperly excluded.

It is enacted, that "whenever any claim to property shall be made, the same shall not be dismissed, discontinued, or withdrawn, but by the consent of the opposite party." Aik. Dig. 168. The reason why the claimant is inhibited from withdrawing his claim, is this: the plaintiff is entitled to damages not exceeding fifteen *per cent.* on the amount of the execution,

if the jury shall believe the claim was made "for purposes of vexation or delay," and if allowed to withdraw his claim, this right of the plaintiff would be defeated. Aik. Dig. 168. But no such consequence results by the plaintiff's submission to a non-suit; and the statute authorizes him thus to get out of Court, at any time before the jury retire from the bar. Aik. Dig. 283.

The question raised at the argument by the counsel for the defendant, as to the right of the plaintiff to have revived the cause in the Circuit Court, in his name as administrator, does not arise upon the record. The revival, whether regular or not, there took place, without objection from any source.

This disposes of the case as presented, and our opinion is, that the judgment of the Circuit Court must be reversed, and the cause remanded.

LYON, et als. v. LORANT & KREBS, ADM'RS.

1. In a suit in Chancery, in which the corporation of the city of Mobile is defendant, a service of the subpoena on the Mayor of the city would be sufficient; but the return of the sheriff, that he had executed it on H. Chamberlaine, Mayor of the city of Mobile, is not proof that Chamberlaine is the Mayor.

Error to the Chancery Court at Mobile.

THIS was a bill in chancery, filed by the defendants in error, against James G. Lyon, Samuel H. Garrow, and the Mayor and Aldermen of the city of Mobile, praying the foreclosure of a mortgage. The sheriff returned on the *subpœna*, that he had served it on Lyon & Garrow and H. Chamberlaine, Esq. Mayor, for the Mayor and Aldermen of the city of Mobile.—The defendants failing to appear, a judgment *pro confesso*, was entered, and upon the report of the master, a decree of foreclosure, and sale of the premises was decreed. From which the defendants prosecute this writ of error, and assign for er-

ror, that there is no proof in the record that H. Chamberlaine is Mayor of the city of Mobile, and therefore, the Mayor and Aldermen of the city of Mobile, were not before the Court.

CAMPBELL, for the plaintiff in error.

DUNN, contra.

ORMOND, J.—The objection to the decree is, that it is founded on a *decree pro confesso*, for a failure to answer the bill, and that there is no evidence in the record, that the Mayor and Aldermen of the city of Mobile, who are parties to the bill, and against whom there is a decree, had notice of the proceeding by service of *subpœna*. The only evidence that they were so served with *subpœna*, is the return of the sheriff that it was executed by leaving a copy of the bill with H. Chamberlaine, Esq. Mayor, for the Mayor and Aldermen of the city of Mobile.

In the case of Walker v. Hallett, 1 Ala. Rep. N. S. 379, we held, that when a Bank was a party defendant to a bill, service of the *subpœna* on its President, would be notice to the corporation, of the pendency of the suit. So there can be no doubt that the *subpœna* in this case might have been executed on the Mayor of the city, as its executive officer. It does not, however, appear from the record, who is the Mayor, except from the return of the sheriffs, which cannot be considered evidence of that fact, but as the corporation did not appear to conclude its rights by affecting it with notice, it should have been proved, that the person on whom the process was served, was the Mayor of the city.

The decree made in the case, affects the interests of the corporation, and as it has not appeared, the necessary proof must be made to show that it has been cited to appear. For this error, the decree must be reversed, and the cause remanded.

**MCWALKER V. THE BRANCH OF THE BANK OF THE STATE
OF ALABAMA AT MOBILE.**

1. In a summary proceeding by a Bank, the judgment entry, if the judgment is by default, must shew a legal title in the Bank to maintain the action ; and where, in such a judgment, the note is described as payable to Andrew Armstrong, cashier, or bearer, the legal title will not be presumed to be in the Bank, unless the judgment entry shows the note to be endorsed to the Bank ; or unless the judgment entry avers the note to have been made payable to the Bank, by the name and description of Andrew Armstrong, cashier.

Writ of error to the Circuit Court of Mobile county.

JUDGMENT on motion by the Bank against the defendant.

The judgment entry recites that the Bank moved for judgment against the defendant, as the maker of a promissory note, payable to Andrew Armstrong, Cashier, or bearer, and negotiable and payable at the said Bank. But does not show the legal title to be in the Bank, by averment or otherwise.

This matter, with others, is now assigned as error.

STEWART, for the plaintiff in error.

ATTORNEY GENERAL, contra.

GOLDTHWAITE, J.—We have repeatedly held, that where a judgment by default is had in these summary proceedings, that the judgment entry must show affirmatively, every fact and circumstance which is necessary to support the jurisdiction of the Court ; and also, in judgment by default, to show the legal liability of the defendant. In the present case, the note is averred to have been made payable to Andrew Armstrong, Cashier, and it does not appear from this, that the Bank has any legal interest in the note. It is said to be the universal custom of this Bank, to take notes of this description for its loans, &c. This may be true, but it does not change the legal aspect of the case. The Bank could have averred that the note was payable to the corporation by the name and description of Andrew Armstrong, Cashier. *Medway Cotton Manufactory v. Adams*,

10 Mass. 360; Child v. Bank of Passamaquoddy, 3 Mason, 505. Or it might have traced title through his indorsement.

The *prima facie* intendment which arises out of this note, does not show any connexion of the legal interest in it, to belong to the Bank.

The judgment must be reversed for this error, and the cause remanded.

The same judgment is given in two other cases between the same parties, involving the same question.

CURRY & CO. V. PAINE, ADM'R. &C.

1. A variance between the writ and declaration can not be reached by general demurrer, but must be brought to the view of the Court by plea in abatement.
2. W M declared as "administrator," without designating the estate on which he had administered, and disclosed as the cause of action, the indorsement of a promissory note by the defendant to the plaintiff; upon the cause being called for trial, W S P, administrator *de bonis non* of J G, deceased, was made a plaintiff, instead of W M—*Held*, that the declaration was by W M, individually, and the administrator of a third person could not be substituted as a plaintiff.
3. Where it is proposed to revive a suit in the name of an administrator as plaintiff, the defendant may require the production of the letters of administration; but if he pleads the *general issue*, he can not require them to be adduced to the jury.

WILLIAM MAGEE, as administrator *de bonis non*, of James Goodwin, deceased, brought an action of *assumpsit* in the County Court of Mobile, against James Curry and Charles W. Gazzam, as partners under the style of James Curry & Co.

In his declaration, Magee describes himself as administrator generally, and declares against James Curry and Audley H. Gazzam, as partners, &c.

There was a general appearance and demurrer, which being overruled, the defendants pleaded *non assumpsit*.

Upon the cause being called for trial, Wm. S. Paine, as ad-

ministrator *de bonis non* of James Goodwin, deceased, was made a party plaintiff, instead of Magee.

It appears from a bill of exceptions taken at the trial at the instance of the defendants, that after the general issue was pleaded, they craved oyer of the plaintiff's letters of administration; and further, the case being submitted to the jury, and the plaintiff's testimony closed, they moved the Court to charge the jury, "that after the defendants had craved oyer of the plaintiff's letters of administration, he could not recover against the defendants until he had produced them in open Court;" which charge the Court refused to give, and the defendants excepted.

A verdict and judgment being rendered in favor of the plaintiff, the defendants prosecute a writ of error to this Court.

J. A. CAMPBELL, for the plaintiffs in error, submitted the cause. No counsel appeared for the defendant.

COLLIER, C. J.—1. It is insisted for the plaintiffs in error, that their demurrer should have been sustained by the County Court, because the writ is at the suit of Magee, administrator of Goodwin, and against James Curry and Charles W. Gazzam; and the declaration is at the suit of Magee, in his own right, and against Curry and Audley H. Gazzam.

The variance between the writ and declaration, is certainly such as is supposed; but it has been repeatedly held, that a variance between the writ and declaration, cannot be reached by general demurrer, but must be brought to the view of the Court by plea in abatement.

The word "administrator," which follows the name of Magee in the commencement of the declaration, is a word to which no definite meaning can be attached, in the connection in which it is found. It does not show of what, or of whose estate he is administrator, and cannot even be regarded as *descriptio personæ*. The declaration then, was at the suit of Magee, individually. This being the title which the declaration had given to the action, it was irregular to substitute as a plaintiff, Wm. S. Paine, administrator, *de bonis non* of James Goodwin, deceased. The cause of action as disclosed by the declaration, was the indorsement of Curry & Co. of a promissory note to Magee, and on that, the administrator of Goodwin could

not recover. If the declaration had followed the writ, then the substitution of Paine would have been proper. But as the cause is shown by the record, it is clearly erroneous. It is nothing less than this, the bringing in of a new party as plaintiff, when there has been no abatement by death or otherwise; and this too, although it does not appear that the party coming in, has any interest in litigating the matter in controversy.

3. If the suit could have been revived in the name of Paine, the defendants might, before plea, have insisted to the Court, that the plaintiff should have produced the letters of administration under which he acted; but having pleaded the *general issue*, he could not be required to produce them as evidence before the jury.

But for the second objection here taken by the plaintiffs, the judgment of the County Court is reversed, and the cause remanded, that it may, if practicable, be regularly proceeded in by the plaintiff below.

CREIGHTON, *et als.* v. THE PLANTERS AND MERCHANTS BANK.

1. Where, on motion of the purchaser, at a sale of mortgaged premises, under a decree of foreclosure, a writ of possession is directed by the Chancellor to issue against the person in possession, an appeal from such order, by the tenant, against the purchaser, is the most appropriate remedy; but as such an order is final in its character, a writ of error will lie.

Error to the Chancery Court at Mobile.

THE facts of this case sufficiently appear in the opinion of the Court.

STEWART, for plaintiff in error.

DENN, contra.

ORMOND, J.—The merits of this case were determined when the cause was here at the last term, by the name of

Creighton *et als.* v. Paine & Paine, but dismissed, because the appeal was not prosecuted against the proper parties. The only difficulty we now feel is, whether a writ of error will lie to such an order as the present.

The bill was filed by Paine & Paine, to foreclose a mortgage, and at the sale, which was ordered of the mortgaged premises, the Planters and Merchants Bank became the purchaser, and on motion of the Bank, the Chancellor directed a writ of possession to issue. This was an order final in its character, and materially affecting the interests of those in possession of the premises, with which the complainant and defendant in the original suit, have no connexion.

The affirmance of the master's report, when no exception is taken, is a matter of course, and is a part of the original proceeding, but when, as in this case, the purchaser becomes an actor by praying the action of the Court in his behalf, against those in possession, it is a new proceeding, for which he is alone responsible. The most proper mode of revising an error in a matter this kind would be by appeal, which must be prayed at the time at which the order is made. This was attempted in this case, but as the appeal was prayed against the complainant, instead of the purchaser, the appeal was dismissed, and if a writ of error will not lie, there can be no redress.

By our statute, appeals and writs of error, appear to be considered as equivalent remedies, and we think we shall most effectually carry out their intention by allowing the writ in this instance.

The proceeding in this case, at the instance of the Planters and Merchants Bank, being wholly irregular, must be reversed.

CAMERON AND JOHNSON V. NALL.

1. When a note is made for the purpose of being sold by the payee, at a greater discount than the legal rate of interest, and is sold to one who is ignorant of the purposes for which the note was made, the latter is not chargeable with usury; and although the note in his hands would be liable to be scaled to the amount paid for it, as having no other consideration to support it, yet if the parties subsequently give a new note, the defence arising out of the consideration can not be made, as it is equivalent to a new promise to pay, without disclosing the defect in the consideration.

Writ of error to the Circuit Court of Fayette county.

ACTION of debt on a promissory note, made by the plaintiffs in error, payable to D. M. Johnson, and by him assigned to the defendant in error. The defendants pleaded *nil debit* and usury, on which issues were joined and verdict for the plaintiff.

At the trial, the defendants gave evidence tending to show, that in April 1837, they and another person made a note for three hundred dollars, payable to D. M. Johnson, in December then next; for the purpose of being sold to the plaintiff, who purchased it, for two hundred and twenty-five dollars. There was no evidence that he knew the purpose for which the note was made. The note sued on, was given to take up the former note, and was payable in January, 1839.

On this state of facts, the defendants requested the Court to instruct the jury, if they believed the original note was made with the design stated, it was tainted with usury in the hands of the purchaser, although he was ignorant of the object for which it was made; and that the usury might be taken advantage by the defendants. These instructions were refused, and the jury was charged that the defendants could have no advantage if the purchaser was ignorant of the object for which the note was made.

PECK, for the plaintiff in error, cited *Faris v. King*, 1 Stewart, 255; *Metcalf v. Watkins*, 1 Porter, 57.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—If the statute in relation to usurious interest, had remained unchanged, the cases cited would be conclusive to show that the original note was void, even in the hands of a *bona fide* holder; but such is not now the case, for the act of 1834, Aik. Dig. 655, provides that the note shall be void only *as to the interest*. This note was not, therefore, void in its inception, but it presents the case of a note made without any consideration moving from the payee to the makers; it was made for the purpose of being sold to the present holder of the substituted note, and if he had acquired it, with a knowledge of the intention, would have only been void for the excess above, the sum paid by him for it. It is probable that in this condition of things, the maker would have been permitted to show, in defence, that the note had no other consideration to support it, than what was paid by Nall, and they would not be tolerated to conceal from him the fact that the note was without consideration, and afterwards insist on it as a defence.

He had a right to purchase the note, and after purchase, it could be avoided in his hands for any want or failure of consideration, unless the makers had concealed the fact, on his application to them for information. He afterwards applied to them for payment, as we must presume, and they gave a new note, due more than a year afterwards: Even then they make no claim of a defence. We think the new promise was a waiver of any defence, as to the original consideration, and it would be a fraud on the holder, to permit the defendants now to inquire into the defective consideration of the first note.

Let the judgment be affirmed.

BRYANT, et al. v. PETERS, et al.

1. A motion to dismiss a cause in Chancery, for want of Equity, may be made at any stage of the proceeding—it admits the allegations of the bill to be true, and is to be determined upon an inspection of the bill only.
2. In a bill by the heirs and distributees, against one assuming to act as administrator, it was alleged that the complainants could find no order granting administration, nor any administration bond in the Orphans' Court of the county from which he pretends to have derived his authority; and consequently, they believed the defendant was never appointed administrator; and further, they believe he will waste the decedent's estate, and remove from the State; *Held*, that the allegation authorised the interference of Equity for the purpose of "precautionary justice."
3. It is competent for a Court of Equity to compel the production of deeds and other writings, where the party complaining shows *prima facie*, that his interest requires it. And an administrator may, at the suit of the heirs, devisees, and other persons entitled, be required to deliver up the title deeds of their respective estates.
4. The cause was called for hearing, and there being no replication to the answer, or depositions taken for either party, a motion was made by the complainant to amend his bill—*Held*, that the amendment should have been allowed.

THE complainants describing themselves as the heirs and legal representatives, with the exception of one, who describes herself as the widow and relict of William Bryant, deceased, filed their bill in April, 1837, on the equity side of the Circuit Court of Tallapoosa. The bill, after stating the relationship of the complainants to decedent, alleges, that he "obtained and amassed" a very considerable real and personal estate, some of which consisted of lands in the State of Georgia, and the residue of nine half sections of land in Tallapoosa county, and a valuable house and lot in the city of Tuskaloosa, together with many bonds and other choses in action; besides twenty-four or five negroes, whose names &c. are particularly set forth. In addition to all which, it is averred, that the decedent owned at the time of his death, a large stock of horses, hogs, cattle and goats; also corn, fodder and groceries, with household furniture, plantation tools, &c. besides about four thousand dollars in cash, which he had in his possession.

The complainants further allege, that the decedent was not in debt at the time of his death, as they believe, more than five

hundred and fifty dollars, and that he made no will of recent date, as the complainants believe. They are however informed and charge, that he made a will about ten years ago, by which, as they understand, "he disposed of all his property" to them; but they cannot undertake to state, with certainty any thing in relation to that will, as the same was taken from the decedent's house by the defendant, John H. Peters.

It is further stated, that the complainants have heard it rumoured, and some of them have seen a writing, which they understand some persons say, is the last will of the decedent. By that paper, a legacy of one hundred dollars is given to a negro woman named Sally, and the like sum to each of several other negroes: a legacy of two hundred dollars, to Richard Plunket, of the county of Tallapoosa; and the lands of the decedent, in the State of Georgia, are devised to four of the complainants, his children, to wit: Jackson, Nancy, Elizabeth and Luraney. And it is declared by that paper, that the decedent's son, Needham, one of the complainants, "shall be excluded from any share or interest in the said estate, *because of his ingratitude.*" The residue of the estate of the decedent, is devised and bequeathed to one Robert F. Randall, an individual whom they have never seen, and of whom they have never heard; and consequently, believe that there is no such person.

It is further alleged, that at the time of the decedent's death, the complainants were all of full age, and on terms of friendship with him, with the exception of his widow; and they positively deny that he executed the pretended will, or if he did, it was at a time when he was labouring under some mental derangement, to fits of which he was subject, for some years previous to his death.

The complainants also state, that one of them, viz: Needham Bryant, came from his residence in Georgia, to the late residence of the decedent in the county of Tallapoosa, for the express purpose of administering upon the estate he had left. Upon his arrival at the decedent's residence, he found his papers locked up in a chest or bureau, and the premises in the possession of the servants belonging to the estate. That he examined all these papers with care, three several times, the last examination being made in the presence of William Goldsby, John H. Peters and Richard Plunket, two of the defendants, but was un-

able to find any paper purporting to be a will, except a writing made about ten years previously.

It is further stated, that the complainant, Needham, being in competent to manage the administration of his father's estate, soon after his arrival in Tallapoosa, employed the defendant, John H. Peters, who is a counsellor and attorney at law, to aid him in the matter; and to obtain for him and in his name, letters of administration thereupon; and to this end, he executed a power of attorney, authorizing Peters to sign his, Needham's name, to such bond as might be required to obtain letters of administration. All of which Peters did agree to attend to, and Needham returned to Georgia in a few days, that he might move to Tallapoosa, and attend to the business of the estate. But instead of taking out letters of administration in the name of Needham, Peters, as the complainants "believe, in violation of the laws of the land, and without any authority, (unless it is from pretended letters of administration on said estate) assumed to himself, the right to manage said estate;" and before Needham reached Tallapoosa again, (which was after a few weeks absence,) Peters had advertised that all the slaves and other personal property of the estate would be sold on the 7th and 8th days of February, 1837. On the days appointed for the sale, the complainants all attended, and remonstrated against a sale of the property, but Peters declared that he would sell, and that a will of a recent date, made by the decedent, had lately been found, (which is the paper already described, and bears date the 26th September, 1836.) The sale progressed and property was sold to the amount of upwards of fourteen thousand dollars, and bonds taken by Peters payable to himself.

It is further charged, that Peters has had "and still retains in his possession all the papers belonging to the estate of the said decedent, together with the said old will, made about ten years ago, and the said paper purporting to be a late will of said decedent.

The complainants charge it as their belief, that Peters will waste the estate of the decedent, and they fear he will transfer the bonds, &c. due the estate to innocent persons; and that Peters' estate is insufficient to make good the loss which the complainants would sustain thereby: besides, they have been

informed and believe, that he intends to leave this State, without the intention of ever returning.

It is further alleged, that Peters pretends to act in virtue of letters of administration, yet they have carefully examined the office of the clerk of the County Court, and find there, no evidence that letters of administration have been granted on the decedent's estate; and they are informed by the Clerk that none have been granted, yet they are unable to deny with certainty, this pretence of the defendant, Peters.

Among other prayers, the bill prays, that "Peters may be compelled to produce said writing, purporting to be said pretended late will, and also said old will, and that he answer and say by what means he obtained said papers and all the other papers, and by what authority he has acted, and does now act in the said matters; and that he fully and fairly account and exhibit a full and entire statement of all the property, choses in action, money and other things, which came into his possession from the said estate of said decedent; and that he state what became of all such matters, and that said Peters, further answer what has been done with the residue of the slaves and other property belonging to said estate, which was not sold on said 7th and 8th days of February, 1837." *And further*, that a writ of *ne exeat* issue, forbidding the defendant Peters, from leaving the State; and that Peters be restrained and enjoined from collecting, and the other defendants who were purchasers at the sale mentioned, from "paying all, or any part of the purchase money to any person until the matters and things in this bill contained, are fully heard. And that your honor will cause such issue or issues to be made up between the rightful parties, which may be necessary to investigate the validity of said pretended late will; and that said Peters give a true state of the said sale; state who were the purchasers of every article sold, for what amount it sold, who were the sureties to the notes taken, and where said notes now are; and that your honor will grant all such other and further relief which to your orators and oratrixes in the premises may pertain." *And lastly*, that process of *subpœna* may issue, &c.

Writs of *Ne exeat* and *Injunction* were awarded, in conformity to the prayer of the bill.

Peters answered the bill, denying very fully, all profession-

al, moral or legal impropriety in his interference with the estate of the decedent, and asserting that he had been duly appointed an administrator thereof by the County Court of Tallapoosa, and that he had acted under the authority thus conferred. Other proceedings were had in the cause during its pendency in the Circuit Court of Tallapoosa, which it is not material to notice; and upon the organization of separate Courts of Chancery, the cause was transferred to the Court, directed to be holden at Talladega. At the term of that Court, holden in February, 1840, a motion was made to dismiss the bill for want of equity. The Chancellor thought that "the whole subject of the probate of wills, granting letters of administration, appointing guardians, revoking administration, decreeing distribution, &c. is committed to the County or Orphans Court;" but he conceded, that under our statute, where a will is admitted to probate, its validity may be contested in chancery, at any time within five years from the date of the probate. He was of opinion, that it did not appear that the will in this case had been proved, or that Peters was acting under it, and dismissed the cause as one of which the Court had no jurisdiction.

It appears from the record, that the counsel for the complainants, upon the cause being called, moved the Chancellor for leave to amend their bill in a very material respect; and, after the Chancellor had read his decree, submitted in writing, the amendment desired to be made. But leave to amend was denied by the Chancellor, on the ground that the "motion came too late, and if granted, would make a *new case*."

To revise the decree of the Court of Chancery, the complainants have sued a writ of error to this Court.

WM. P. CHILTON, for the plaintiff in error. The Chancellor overlooked the object of the bill. He seems to have regarded it, as filed for the purpose of testing the validity of the supposed will of William Bryant, deceased. Had such been its object, the decree would be unobjectionable; for here, as in England, until the will is admitted to probate, Chancery has no jurisdiction to direct an issue of *devisavit vel non*; unless, perhaps, the parties interested, consent thus to test its validity, which some of the authorities maintain may be done in equity, even before probate.

The bill avers, that it was the intention of the next of kin to administer on the estate of Bryant; that he employed Peters as an attorney and counsellor to aid him, and gave him a power of attorney to obtain letters of administration, and execute a bond in his name. That Peters instead of following the directions of his principal, in his absence took possession of all the property of the decedent—advertises and sells the same; alleging that he has found a will of the decedent, which justifies the proceeding, and which gives nearly all the estate to a person not related to the decedent, and whom the complainants believe has no real existence. That Peters claims to be an administrator, but the complainants charge, if he have letters, they were fraudulently obtained, and no bond or other record evidence of his appointment can be found: *And further*, that he threatens to waste the estate to an extent beyond his ability to make good in damages. That he threatens soon to leave the State, to return no more, &c. True, the bill alleges that the pretended will is void, prays a discovery &c. an account and distribution, that an issue of *devisavit vel non* be directed and for general relief.

Peters divested himself of the character of attorney, and assumed to act in his own name, and in doing so committed a breach of faith, by which he should not profit. 1 Story's Eq. 306. The Chancellor should have compelled him to account, although he may have had letters of administration. The heirs and distributees were all of age, the estate owed comparatively nothing, and they might have made a division and distribution among themselves. Gayle v. Singleton, 1 Stew. Rep. 566; Dobbs, et al. v Cockerham's distributees, 2 Porter's Rep. 328; Toller's Exr. 480; 5 Bac. Ab. 447; 1 P. Wm's 544—575; 2 Fonb. Eq. 322; Story's Eq. 109.

It is alleged, that the records of the County Court furnish no evidence, that administration was ever granted to Peters.

This being the case, there could be no proceedings to revoke his authority either by appeal, or in the County Court.

It is shown by the bill, that the property of the decedent's estate was wasting through the agency of Peters, who was about to remove himself beyond the State. If equity could not relieve under such circumstances the complainants would be remediless; for before letters could be obtained and suit

brought, the property or a portion of it, would be irreclaimably lost. The equity then, is defensible as a bill *quia timet*.

Again: The jurisdiction of chancery is undoubted, to recover the muniments of title; and such is in part the object of the present bill.

It matters not whether Peters is administrator or not, equity will regard him as a trustee for the parties interested; will provide for the proper management of the estate, and an equitable distribution, and appropriation of it. 1 Story's Eq. 406; 2 Story's Eq. 131; Fonb. Eq. B. 1, ch. 1, sec. 8, and note 9; 1 Bro. Ch. Rep. 277; 3 Bro. Ch. Rep. 624; 2 Atk. Rep. 213.

The defendant, Peters, insists in his answer, that the will of 1836 has been proved, and may be seen on the records of the Orphans' Court of Tallapoosa. The will is set up in bar of the complainant's right to the estate of the decedent, and Peters insists on it in his defence; and thus its validity is drawn in question.

It is admitted, that upon authority, fraud in obtaining a will, forms an exception to the exclusive and concurrent jurisdiction of equity over frauds, yet the liberal views of *Lord Hardwick*, in *Chesterfield v. Jansen*, 2 Ves. Rep. 155, seem more consonant to reason. And so thinks Mr. Justice Story, 2 Com. on Eq. 422.

Chancery, which looks mainly at the merits of a controversy, has been liberal in allowing amendments. In the present case, the necessity of the proposed amendment, was suggested by the answer, and it should have been allowed to the complainants, to put in issue the new matter. Story's Eq. Plead. Amendments have been allowed even after decree. 2 Mad. Ch. 289; Blake's Ch. 195; Bradford v. Felder, 2 McC. Rep. 170; Beauchamp v. Gibbs, 1 Bibb's Rep. 483; Rose v. King, 4 Hen. & Munf. Rep. 475; 3 P. Wms. Rep. 357.

True, more latitude is allowed where the amendment is as to parties, than where it relates to the subject matter of complaint. The amendment proposed to be made, seeks only to render the obligations of the bill more definite, and charge Peters as administrator *cum testamento annexo*, instead as executor *de son tort*. To drive the complainants to a new bill, would be productive of costs and delay to them, without a corresponding benefit to any one.

Lastly: A bill should set forth such a state of facts as would give the Court jurisdiction; but where chancery obtains jurisdiction for one purpose, it will retain and dispose of the whole case.

There are cases where the defects in the bill may be aided by the answer; and it has been held, that where a defendant has fully answered, it is too late to object to the want of equity.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—A motion to dismiss a bill for want of equity, does not authorise the chancellor to look into the answer and proofs, if there be any, but it is to be determined upon an inspection of the bill only; if that does not disclose a case authorising the interference of chancery, according to our practice, it may be dismissed on motion, at any stage of the cause. The question then to be determined, is not, whether if the cause had been submitted for hearing on the bill, answer and exhibits, the decree should have been adverse to the complainants, but supposing the bill to be true (as for the purpose of the motion it must be considered,) are the complainants entitled to relief?

The chancellor thought the object of the bill was to contest the validity of what it characterizes as a pretended will of the decedent, alleged to have been made in the year 1836; and while he conceded, that such a contestation was allowable in equity, any time after the expiration of five years from the date of the probate, yet as it did not appear that the will had been proved, he repudiated the cause. Had the sole object of the bill, have been such as was supposed, we are not prepared to say, that the decree would be erroneous; for it is not alleged that the will was ever admitted to probate, though it is prayed that an issue may be made up to try its validity.

The bill alleges among other things, that Needham Bryant, one of the complainants, and a son of the decedent, intended to administer on his father's estate, employed the defendant Peters, as an attorney and counsellor at law, to aid him with his advice, &c, and made a power of attorney to him to obtain letters of administration for, and execute a bond in his, Needham's name. That instead of acting under the power, Peters

took possession of the estate left by the decedent, and pretends to have taken letters of administration in his name from the County Court of Tallapoosa; but the records of that Court do not show such to be the fact, nor is there any administration bond there on file.

That Peters has sold under a pretended order of Court, a number of the slaves, and other personal property belonging to the estate, and says that a will was made by the decedent in 1836, a short time before his death, which makes no provision for some of the complainants, but gives the greater part of his estate to one Robert F. Randall, whom the complainants charge has no real existence.

It is also alleged, that the decedent, about ten years before his death, made a will by which he gave his estate to the complainants; that the will of 1836 was never executed by the decedent, or if executed by him, it must have been during a period of mental derangement.

That Peters has possession of both the wills, and of all the papers, &c. belonging to the estate. That they believe he will waste the estate, and fear he will transfer the bonds, &c.; and that his estate is insufficient to make good the loss which the complainants will thereby sustain: *And further*, they have been informed and believe, that he will leave the State, without the intention of returning to the same.

The bill then prays, that the defendant, Peters, may be compelled to produce the paper purporting to be the last will of the decedent; also, the old will, and answer by what means he obtained them, as well as the other papers of the estate, and by what authority he has, and does now act as the representative of the decedent. That he exhibit a full account of all the money, property, &c. which came to his hands, and that he state what has been done with the slaves and other property not sold by him.

And further, that a writ of *ne exeat* be awarded to restrain the defendant, Peters, from leaving the State; and that an *injunction* issue to enjoin the collection of the money due the estate, &c.: *And lastly*, such other relief as may be proper, be granted, &c.

That the jurisdiction of the Orphans' Court, under the statutes of this State, is not *universal* and *exclusive* over the es-

tates of deceased persons, or of the rights of heirs, legatees and distributees, is abundantly shewn in *Leavens v. Butler, et ux.* 8 Porter's Rep. 396. How far the jurisdiction of that Court may be exclusive, it is unnecessary to consider, as it is clear, there are many cases of that character, in which a Court of Equity only, is competent to afford complete redress.

It is not *directly* alleged that Peters acts as the representative of the decedent's estate, without the authority of law, but the complainants express the belief, that letters of administration have never been granted to him; and as a ground for that belief, state that they can find no order for that purpose, nor any administration bond in the Orphans' Court of Tallapoosa, from which he pretends to have derived his authority; and that the clerk of that Court informs them, there never has been any. Taking this to be true, which a motion to dismiss, impliedly admits, and it is clear the Orphans' Court has no jurisdiction over him. But the complainants, as the heirs and distributees of the decedent's estate are not remediless. Chancery is the appropriate tribunal to which they may resort to injoin Peters from any further interference in the matter, and obtain security for their rights. And even conceding that the possession of the decedent's estate by Peters, is legal; yet if the complainants interest is in jeopardy, that Court will lend them its protection. It is laid down generally, that "where there is a future right of enjoyment of personal property, Courts of Equity will interpose and grant relief upon a bill *quia timet*, where there is any danger of loss, or deterioration, or injury to it in the hands of the party entitled to the present possession." 2 Story's Eq. 142. Bills *quia timet* "are in the nature of writs of prevention to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a Court of Equity, because he fears (*quia timet*) some future probable injury to his rights or interests; and not because an injury has already occurred which requires any compensation or other relief." This jurisdiction "is applied to the cases of executors and administrators, who are treated as trustees of the personal estate of the deceased party. If there is danger of waste of the estate, or collusion between the debtors of the estate and the executors or ad-

ministrators, whereby the assets may be substracted, Courts of Equity will interfere, and secure the fund: and in the case of collusion with debtors, will order the latter to pay the amount of their debts into Court." 2 Story's Eq. 130-1.—The complainants state, not only that they have been unable to find any bond executed by Peters for the proper administration of the decedent's estate; but they believe he will waste the same, to an extent which his own means are insufficient to make good; and they believe further, that he will remove from the State. These allegations, coupled with the fact that the complainants are heirs and distributees of a considerable real and personal estate, which has come to the hands of Peters, are entirely sufficient to authorise equity to interfere for the purpose of "precautionary justice."

The equity of the bill in the present case, is defensible upon other grounds. The complainants allege that the defendant Peters has the possession of all the papers belonging to the estate of the decedent; among these, there is one will which makes them the legatees, and another which he, Peters, pretends, makes another disposition of the estate. Of these papers, a discovery is asked. It is the acknowledged office of chancery, to compel the production of deeds and other writings, where the party complaining, shows *prima facie*, that his interests require it. 2 Story's Eq. 12-13. If the facts be as supposed, is it not essential to the adjustment of the rights of the parties claiming under these writings, that they should be produced, that the proper steps may be taken to test their validity as wills, and the letters of administration, if any have been granted, may be revoked? If the first will be valid, the complainants cannot recover their legacies through the agency of the Orphans' Court, until it is regularly proved and established; and this can only be done when it is produced, or if lost, its contents proved.

Again: It is alleged that the decedent at the time of his death, was the owner of a large real property, both in this State and Georgia. Now it is presumable, that for this, he had deeds or evidences of title, all of which are said to be in the possession of Peters. And although he may be an administrator, as he insists, yet he would not be required to return a schedule of these papers to the Orphans' Court. Ordinarily an ad-

ministrator has nothing to do with the real estate of his intestate, and the bond executed by him, upon receiving his authority, does not undertake for its administration. Upon a deficiency of the personal assets, &c. he may petition for an order of sale, &c. of the lands, but otherwise his duties do not require him to interfere with them. See adm'r's oath, Aik. Dig. 177. This being the law, it is essential to the interest of heirs, and others, that equity should possess the power to compel the production of title papers, and provide for their safe keeping, while the personal estate is in the course of administration. The law as extracted from the English adjudications on this point, is thus stated: "Heirs at law, devisees, and other persons, properly entitled to the possession and custody of the title deeds of their respective estates, may, if they are wrongfully detained or withheld from them, obtain a decree for a specific delivery of them." 2 Story's Eq. 13, and cases cited.

To say nothing of the extensive jurisdiction exercised by Courts of Equity; in cases in which a client complains against his counsel, a principal against his agent, and over legacies, and the distribution of estates; and in matters of account and trust, as well as in compelling a discovery with a view to relief in that tribunal, or some other, we think the equity of the bill is sufficiently shewn from what has been already said.— 1 Story's Eq. 306-7, 310, 436-8-9, 441, 506-7-8, 512, 542.

According to the practice in the English Chancery (which in the absence of any rule of our own, at the time this cause was decided below, must be our guide, 24 rule of the practice in chancery, 5 Stew. & P. Rep. 12,) the complainant before he files his replication, may amend his bill as a matter of course, and even without costs, if he does not thereby put the defendant to additional expense. Lube's Eq. Plead. 62. But no substantive amendment can be made after that period, for that would be to open the pleadings a second time; but even then under special circumstances, the complainant will obtain leave to withdraw his replication in order to add an amendment.— This indulgence will not, however, be granted after the publication of the depositions; for it would be unjust to permit the complainant to put new facts in issue, when he should happen to find that those on which he originally relied, were not substantiated. In such case, his only remedy is to file a supple-

mental bill. Lube's Eq. Plead. 65; Hoffman's Ch. Pr. 284; *et post.* Story's Eq. Plead. 268, *et post.* In the case at bar, only one of the defendants had answered, and the complainants had not replied to that answer, nor had depositions been taken for either party. According then, to the practice as we have stated it, the motion to amend the bill was in time, and should have been granted.

Whether a refusal to permit an amendment which should be allowed, will authorise the reversal of a decree on error, we need not consider. What we have said in regard to the practice on this point, will sufficiently indicate the course of proceeding in the future progress of the cause. And without adding any thing further, our conclusion is, the decree must be reversed, and the cause remanded.

MORGAN, MANN AND BALL V. BILLINGS.

1. Where the penalty against a constable, for failing to return an execution, was the amount of the judgment, and for failing to pay over the money on demand, after satisfaction of the execution, was the amount of the judgment, and ten *per centum* per month damages—*Held*, that as the latter included the former, the insertion of both in the notice, for the motion, could not be objected to, after a verdict finding all the allegations true, but would have been a valid objection to the motion, if it had not been waived by taking issue on the facts.
2. When several defaults, for not paying over money on distinct executions, were embraced in the same motion, as the amount of each default was sufficient to give the Court jurisdiction—*Held*, that no objection could be taken after a verdict, on an issue made up, on the motion to the union of separate causes of action in the same motion; the Court considering it equivalent to a consolidation, by consent, of distinct motions.
3. The penalty of ten per cent. per month, on the amount of the judgment, against a constable, for failing to pay over money made by him on an execution, can be computed only from the time of the demand made.

Error to the Circuit Court of Barbour.

THIS was a motion made in the Circuit Court of Barbour county, by the defendant in error, against Morgan, as constable, and Mann and Ball as his sureties, upon a notice for failing to pay over, on demand, one hundred and thirty-nine dollars, alleged to have been collected on four several executions, which issued from a Justice of the Peace, in favor of the defendant

in error, against Samuel N. Brown and others, together with ten per cent. per month on the sum so collected, from the time of the demand; and in case the motion aforesaid, is refused, then the plaintiff will move against the constable and his sureties for failing to return the executions aforesaid.

Upon which a judgment was rendered; which recites that the parties appeared by their attorneys, and that upon issue joined, the jury found the allegations contained in the notice to be true, and find for the plaintiff, one hundred and twenty-five dollars sixty-seven cents, and the further sum of three hundred and twenty-four dollars thirty-three cents, ten per centum damages from the time of the collection, demand and default, and that the defendants, Mann and Ball, are the sureties of the constable; upon which the Court rendered judgment for four hundred and fifty dollars, the aggregate of the sums so found as aforesaid, with interest thereon, at the rate of five per cent. per month from the rendition of the judgment, until satisfaction thereof, and costs.

From which, the defendants prosecute this writ of error, and now assign for error.

1st, that the notice is insufficient:

2d, the notice contains two distinct grounds of proceeding.

3d, the verdict and judgment do not respond to the notice.

4th, because several distinct causes of action are embraced in the same motion.

5th, the judgment is uncertain as to which of the defaults charged, and does not correspond with the verdict.

Buford, for plaintiff in error.

Harris, contra,—cited 5 Porter, 537; 8 Porter, 99, 361; 2 Stew. and Porter, 112; 5 Stew. and Por. 441.

ORMOND, J.—Notwithstanding this is a proceeding on a highly penal statute, and the judgment is obtained on motion, we cannot perceive that there is any error in the proceedings.

Most of the objections that are raised by the assignment of errors, are cured by the verdict of the jury, or waived by taking issue on the facts of the notice.

In *Hill v. The State Bank*, 5 Porter, 537, we held, that when the act complained of, subjected the sheriff to different penal-

ties, at the election of the party aggrieved, he must specifically state in the notice on which he will proceed. The notice in this case, was for failing to pay over money made by the constable, on demand, and also for failing to return the executions, had the notice been objected to on this ground, it could not have been sustained. But the jury find, by their verdict, that all the facts alleged in the notice, are true: and as the verdict ascertains that the money was not paid over on demand, it is entirely unimportant that it also shews that the executions on which the money was made, were not returned, as the result is not changed by the additional fact, that the executions were not returned. The penalty for a failure to return, being the amount of the judgment only, and for a failure to pay over the amount on demand, the amount of the judgment and ten per cent. per month thereon. It is therefore obvious that the offence of failing to return the execution is merged in the penalty for failing to pay over the money.

It is also said that the verdict is uncertain, and does not show from what period the ten per centum is calculated; whether from the time of the collection of the money, or the refusal to pay it over on demand.

The statute, (Aik. Dig. 175,) is highly penal in its character, and rather ambiguous in its terms, as to the time from which the computation shall be made; and applying to it the well known rules of construction, we should incline to think that the ten per centum could only be calculated from the time of the refusal, to pay upon demand, and by a computation, we ascertain that the jury have in fact computed the damages only from the time of the demand made.

It is also supposed there is error in embracing the defaults on the several executions, in one motion. There can be no doubt this would have been irregular, if by taking issue on the notice in which they are all embraced the objection, had not been waived. If separate suits had been commenced, they might have been consolidated on motion; that appears to have been done here by the consent of the parties.

In these summary proceedings, where the judgment is by default, the *judgment* must show affirmatively, every fact necessary to give the Court the summary jurisdiction, and must also shew the facts upon which the liability of the defendant de-

pend; but where the defendant appears and an issue is tried, the verdict ascertains the liability of the defendant, as it does in other suits prosecuted in the ordinary mode. As an issue was tried here, the only question is, whether the facts necessary to give the Court jurisdiction appear—we think they do. The motion is to be made in the Circuit or County Court, when the ten per centum damages will exceed fifty dollars.

The jury find all the allegations of the notice to be true, and as the issue is made up on the notice, we must look to that to ascertain the facts put in issue. The default charged, is the failure to return four executions, which are particularly described. The smallest in amount, is twenty-nine dollars forty-four cents, and as the demand was made on the 8th July, 1838, and the trial had at the fall term, 1840, it will be seen that the ten per centum, per month, on that sum for the intervening period, will greatly exceed fifty dollars, and that therefore, the Circuit Court had jurisdiction, in each of the cases which were thus by consent, consolidated.

It results from this examination, that there is no error in the record, and the judgment must be affirmed.

COCKE V. THE BRANCH BANK AT MOBILE.

1. One of a firm of tavern keepers, has no authority to bind his co-partner, by a note, of which the consideration has no connexion with the business of the joint concern; and the want of such consideration may be shown in defence to an action, by a *bona fide* holder of the note.

Writ of error to the County Court of Mobile county.

MOTION by the Bank for a judgment against the defendants, as makers of a promissory note. The defendants pleaded *non assumpsit*; and it was agreed between the parties that this should stand as a plea of *non est factum*, denying the execution of the note and its indorsement by Lea & Langdon, the payees.

At the trial, the plaintiffs produced a note for the sum of \$4609, signed, J. F. & W. Cocke, payable to Lea & Langdon, and indorsed thus: Lea & Langdon, in liquidation. The plaintiffs then proved that the signature was in the hand writing of J. F. Cocke, one of the defendants; that the defendants were tavern keepers and partners; that the note was transferred to the Bank by Lea & Langdon, in liquidation of their debt to it; and that each partner of this firm had authority to sign the name of the firm, in liquidation of partnership debts.

The defendants then proved by Martin A. Lea, that he obtained the names of the defendants in blank; that the names were signed by J. F. Cocke, without the knowledge of Woodson Cocke, the other partner; that said Cocke owed Lea & Langdon no money, and was under no obligation to him; that no part of the proceeds of the note was appropriated to the defendants; that they are partners in a public house in Marion, and carried on no mercantile business; that the note was transferred in liquidation of Lea & Langdon's debt; and that the indorsement was made after the dissolution of the firm. The defendants further proved, by another witness, that J. F. Cocke, left the blank signature of the firm of J. F. & W. Cocke, with Martin A. Lea, one of the firm of Lea & Langdon; this witness, sometime afterwards at the instance of said Lea, wrote the note over the blank signature; that Woodson Cocke had no knowledge of the name of the firm being left or used; that neither of the defendants had any knowledge of the note being filled up, or of its being used by Lea & Langdon; that they had no interest in the consideration of the note, and derived no benefit from its transfer to the bank; that the defendants were tavern keepers in the town of Marion, Perry county, and were only partners as such; that it was not usual for such partners to give or transfer bills or notes to a large amount, and that it was not necessary, in business of that kind; that the firm of J. F. & W. Cocke were doing no mercantile business, but they bought and sold spirituous liquors for the use of their tavern.

The Court charged the jury, that the want of consideration was not a matter for them to investigate; if one gives his name to another, in blank, he thereby puts himself in the power of that other, to any amount he thinks proper to use the blank: a

partner cannot commit his co-partner for any thing not connected in some manner or other with their partnership business; and if this note was made for any other purpose than in the course of business, Lea & Langdon, to whom the note is payable, could not recover of W. Cocke, who it seems was not privy to the transaction: But the question is, was the Bank acquainted with the circumstances under which the note was made? If so, it cannot recover—otherwise, it must.

A partner may not bind his co-partner after the dissolution of the partnership; but in dissolving, they may, by mutual agreement, bind each other in the liquidation and closing of the concerns of the firm. If the presiding Judge was indebted to one of the jury, and agreed to give him the note of another, in liquidation of the debt, the juror would recover on that note, although the Judge might have obtained it unfairly, unless, the juror was advised or notified of the manner in which it was obtained.

The Court was requested by the defendant, to charge the jury:

1. That should they believe, J. F. & W. Cocke, were tavern keepers in the town of Marion, and that J. F. Cocke signed the names of the firm in blank, under the circumstances stated by the witnesses, and it had no connexion with their business, as tavern keepers, then the plaintiff ought not to recover against Woodson Cocke.

2. That should they believe the note declared on was taken by the Bank, in liquidation of the then existing liabilities of Lea & Langdon; that no new or present consideration was given for the same; that no existing security was released, and that Lea & Langdon were still liable to the Bank for their debt—then the plaintiff did not give a suitable consideration for the note, and ought not to recover.

3. That should they believe the firm of Lea & Langdon was dissolved at the time the note was indorsed to the plaintiff; and that the indorsement of Lea & Langdon was made without the knowledge of Langdon, then the legal title was not transferred to the Bank, and the plaintiffs ought not to recover.

These charges were refused; and thereupon, the defendants excepted as well to the charges given, as to the refusal to instruct as requested. They now assign that the Circuit Court

erred in the several matters covered by the bill of exceptions.

CAMPBELL, for the plaintiffs in error, relied on two positions:

1. That the defendants were not partners in *trade*, and therefore had no authority to bind each other, unless an authority beyond the mere fact of partnership is shewn. The Bank is bound to know the extent of an authority when it is implied from the condition of the parties; if the defendants were partners *in trade*, then a general authority would be implied; if partners in a business, not connected with trade, then the public is held to inquire into the authority of one of the partners, when he attempts to bind the firm, as none is implied from the nature of the business. *Dickinson v. Valpy*, 10 B. & C. 128; *Cary on Part.* 47, *Byles on Bills*, 20; 6 Esp, 18; 4 Dana, 375.

2. That the transfer by Lea to the Bank, was unauthorised by Langdon and consequently, the property in the note did not pass by the indorsement. Whatever equitable title the Bank may have, it cannot prevail against the defendants. *Gow on Part.* 310; *Sanford v. Mickles*, 4 Johns. 224; 1 Nott & McC. 561; 1 Starkie 375; 2 Johns. 300; 1 McCord, 388; 3 Esp. 108; 18 Pick. 505; *Gow on Part.* 77; *Kilgore v. Finlayson*, 1 H. B. 155.

GOLDTHWAITE, J.—1. The first and most important question to be determined here is, whether Woodson Cocke is bound to the payment of the note, executed in the partnership name by his partner.

It is not denied that a copartnership may be formed with respect to any legal business, and the acts of one, with reference to any matter connected with the joint business, will bind the others; but it is insisted that the liability of a partner to pay a note executed by his co-partner, when it is has been put in circulation without any consideration connected with the partnership business, only extends to cases of mercantile partnerships. When the subject is examined, it will be found that the rule is adopted into the common law, from *the usages and customs of merchants*, and applies only to *partnerships in trade*. In such partnerships, each partner is presumed to have the authority to make and indorse promissory notes and bills of exchange; and if a bill or note is issued in the name of the firm, it

will bind all the members of it, when in the hands of a *bona fide* holder, although one of the partners may have put it in circulation in fraud of the others. Chitty on Bills, 45, note M. and cases there cited.

The citation of one or two authorities, will make it sufficiently obvious that there are partnerships to which the rule of the law merchant does not apply. Thus, in the case of Williams v. Thomas, 6 Esp. 18, Lord Ellenborough held, at *nisi prius*, that a *bona fide* holder could not maintain an action, on a bill of exchange, excepted by one of several joint owners of a ship, in the names of all on whom the bill was drawn. The bill on its face, purported to be drawn for goods furnished to the ship, but in fact, was drawn for an account unconnected with it. And in the case of Dickinson v. Valpy, 10 B. & C. 128, the action was also by a *bona fide* holder, and the defendant was sought to be charged as one of the members of a mining company on a bill drawn and accepted by order of the directors of the company. It was held to be incumbent on the plaintiffs to prove that the directors of the company had authority to bind the other members, by drawing or accepting bills; and that the plaintiff not having produced the deed of copartnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills, there was no authority shewn to draw or accept bills; and still less to accept bills in this form, which in effect, were promissory notes.

From these cases, it seems to be questionable whether, partners not in the trade of merchandise, can bind their co-partners by a bill or note; but conceding that they may do so for all matters connected with the partnership business, these decisions are conclusive to show, that beyond this, one partner cannot be bound by another, unless an authority is expressly given, or can be inferred from the circumstances attending the transaction.

In this case, it is stated that the defendants purchased spiritous liquors for the purpose of selling and using in their tavern. This certainly cannot have the effect to make the business of tavern keeping a mercantile trade, so as to bring it within the influence of the custom of merchants.

It is difficult to conceive of any partnership business which does not require some purchases to be made in the usual course of it, and this fact is conclusive to show that the mercantile law does not attach to partnerships for such a cause merely; for otherwise, the case of the ship owners, and of the mining company, would have been within it.

The law presumes that the Bank, if it inquired at all into the partnership of the defendants, must have received information, that they were not partners in a mercantile trade, but only in the business of tavern keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers. We are constrained to declare that Woodson Cocke, is not bound to the payment of this note, under the circumstances disclosed.

With respect to the question, how far the Bank could acquire an interest in this note, under the indorsement of Lea, after the dissolution, we think the case is not sufficiently presented on the facts, to enable us to enter upon it without some risk of deciding a point not involved. We may remark, however, that it is difficult to conceive how Lea, could have been authorised to sign the name of Lea & Langdon *in liquidation*, unless some effect is given to such an authority. Whether his indorsement, under such an authority, would transfer the title or bind the firm, may not be necessary to decide in this case, under the view we have taken. We therefore decline now to consider it.

Let the judgment be reversed, and the case remanded.

MCLENDON V. GODFREY.

1. The plaintiff declared on a written contract, made the 9th July, 1838, to teach an English school *for that year*: the contract produced, was dated of that day, and was a stipulation to teach an English School *for one year*, without stating when it began—*Held*, that the contract given in evidence was variant from that declared on, and consequently inadmissible.
2. *Semble*, parol evidence is admissible to give direction to and apply a written instrument, but not to add to, or vary its terms.
3. Where several persons employed an individual to teach school for them, stipulating if they dismissed him before the term of employment expired, that they would pay him for the time he was engaged—*Held*, that taking the scholars from the school under circumstances to show they were not to be sent back, indicated a willingness to dispense with the teacher's services, and was tantamount to a dismissal.
4. If the plaintiff relies upon an excuse for a failure to perform his contract, he must specially allege it in his declaration; but *it seems*, if he has been prevented from performance under such circumstances as entitle him to recover as much as he would, had he actually performed his contract, he may allege a performance generally.

The defendant in error declared against the plaintiff in assumpsit, in the Circuit Court of Sumter.

THE declaration contains two counts: in the first, it is alleged that the defendant, together with Norris Finley, John Lott and Charles Finley, entered into a written agreement with the plaintiff, bearing date the 9th of July, 1838, by which the plaintiff bound himself to teach an English school for that year, for the defendant and Finley, Lott and Finley; all whom jointly and severally, agreed to pay the plaintiff, the sum of three hundred and fifty dollars, at the expiration of the year, to wit, the year 1838, in case they continued him, and if they should not continue him, to pay him in proportion. The declaration then avers, that the plaintiff's employers did continue him, and that he discharged his duties as a teacher, towards the children of the defendant, &c. in consideration whereof, the "defendant afterwards, to wit, at the expiration of the year, on the last day of the year aforesaid, &c. undertook, and then and there promised him, the said plaintiff, to pay him the said sum of money in said agreement specified, according to its tenor and effect." The declaration then alleges the usual breach:

The second count alleges an indebtedness by the defendant to the plaintiff, in the sum of three hundred and fifty dollars for care, diligence and attendance as a school master, and concludes in usual form.

The defendant pleaded "*non assumpsit*, and the cause was submitted to a jury. On the trial, the defendant excepted to the ruling of the Court, and his bill of exceptions is certified as part of the record.

It appears that the plaintiff offered to read to the jury a writing of the following tenor: "Know all men by these presents, that I, John B. Godfrey, do agree with the undersigned, to teach an English school, for one year, and to do and perform the duties incumbent on me as a teacher, under the direction of the trustees of said school, whose duty it shall be to attend when requested to do so; whose further duty it shall be to adjust difficulties, should any arise, either with any of said trustees and said teacher, between the said teacher and the larger scholars; the said teacher to be left to his own judgment in the government of the said school, and we, the said trustees (or employers) do hereby bind ourselves jointly and severally, to pay the said John B. Godfrey, the sum of three hundred and fifty dollars, at the expiration of the year, in case we agree to continue him so long. But should any improper conduct of his, cause us to dismiss him sooner, we then agree to pay him in proportion for the term of his services. Given under our hands, this 9th of July, 1838.

JOHN B. GODFREY, Teacher.

NORRIS FINLEY,

WM. McLENDON,

JOHN LOTT,

CHARLES FINLEY,

} Trustees.

The defendant objected to the reading of this contract as evidence, under the first count of the declaration, because it varied from the contract described in that count; but the Court overruled the objection, and suffered the writing to go in evidence to the jury; and thereupon the defendant excepted.

The plaintiff then produced a witness, who proved that he commenced teaching the school mentioned in the said contract, under a verbal agreement with the defendant, and the other contracting parties, on the 27th day of February, 1838, and according to a verbal agreement, he was to teach the school for twelve months, but that afterwards, owing to some difficulty

between the parties, the verbal agreement was reduced to writing in July; to the introduction of this evidence under the first count, the defendant objected; because there was a contract in writing, which was declared on, and that it was not competent under the circumstances, to explain or vary it by verbal testimony, and because the verbal evidence embraced a period anterior to the time laid in that count, and varied from the contract therein described. But the Court overruled the objection, and permitted the evidence to go to the jury; and thereupon the defendant excepted.

It was also proved, that the defendant and John Lott, took their children from the plaintiff's school, some time before he ceased to teach; that his school continued until the 17th day of October, 1838, when by the consent of Norris and Charles Finley, it was discontinued. At the time the plaintiff ceased to teach, he had but four scholars, children of the Finleys. The Court on this proof, instructed the jury, that the consent of the Finleys, that the plaintiff might discontinue his school, (their children being his only scholars) was a sufficient excuse under the contract for his doing so; and that he might recover for the time he taught, according to the contract; to which the defendant excepted.

The defendant then asked the Court to instruct the jury, that the plaintiff could not recover under the first count of the declaration; because it was averred therein, that the plaintiff had continued to teach until the end of the year 1838, when it was proved, that he had quit teaching on the 17th day of October, 1838; and because there was no excuse stated, or averred in that count of the declaration, for his ceasing to teach, but the Court refused to give the instruction prayed; whereupon the defendant excepted.

The defendant further requested the Court to charge the jury, the plaintiff could not recover under the first count of the declaration; because, according to the verbal and written evidence introduced, he was bound to have taught the school twelve months from the 27th day of February, 1838, and he quit teaching on the 17th of October of that year; which instructions the Court refused to give; and the defendant again excepted.

The jury returned a verdict for the plaintiff for one hundred

and fifty-one dollars damages, and judgment was rendered thereon; whereupon the defendant prosecutes a writ of error to this Court.

J. B. CLARK, for the plaintiff in error.

J. L. MARTIN & HUNTINGTON, for defendant.

COLLIER, C. J.—Where the declaration purports to set out an instrument according to its substance and effect, it is ordinarily sufficient, if the instrument proved, and the one alleged, correspond in all essential particulars. Let us inquire if the writing declared on, and that given in evidence, thus harmonize with each other.

The plaintiff alleges that on the 9th of July, 1838, he entered into a written contract with the defendant and others, to teach an English school for that year. The declaration avers the expiration of the term of the plaintiff's engagement to be the end of that year, and that the defendant then agreed to pay him his entire yearly compensation. The contract produced and given in evidence is, to teach an English school "for one year;" without designating from what time the year begins. In the absence of an express stipulation on this point, it is clear that the term of the plaintiff's employment began to run from the time when the contract was entered into. The defendant did not agree to pay the plaintiff for teaching a school "for the year;" had such been the language used, then the engagement would have been limited to the current year. But he undertakes, with the other contracting parties, to pay him, "for one year," which, according to all rules of interpretation, commences on the day intimated, and ends on the 9th July, 1839. It will therefore follow, that the writing given in evidence by the plaintiff, was improperly admitted by the Circuit Judge, as being substantially variant from that declared one. *Ferguson v. Harwood*, 7 Cranch's Rep. 408; *Silver v. Kendrick*, 2 N. Hamp. Rep. 160; *Query v. Brindlinger*, Litt. Select Cases, 87; *Lawrence v. Barker*, 5 Wend. Rep. 301; *Taylor v. Hickman*, Litt. Select Cases, 434; *Willoughby v. Raymond*, 4 Conn. Rep. 130; *Curley v. Dean*, 4 Conn. Rep. 259; *Smith v. Barker*, 3 Day's Rep. 312; *Crawford, et al. v. Monell*, 8 Johns. Rep. 253; *Colt. v. Root*, 17 Mass. Rep. 229; *Bulkley v. Landon*, 2 Conn.

Rep. 404; King v. Pippett, 1 T. Rep. 240; Bristow v. Wright, Doug. Rep. 665; Gwinnett v. Phillips, 3 T. Rep. 646.

Parol evidence has been admitted to give direction to and apply a written instrument, but it is not admissible to add to, or vary its terms. 3 Phil. Evi. 1466, *et post.* and cases cited.—The contract adduced at the trial, was sufficiently clear without extrinsic aid, to ascertain the rights and liabilities of the parties; and the admission of parol evidence, so as to give to the writing a retrospective operation, materially changed its import. Its effect was to add to, and even to contradict the instrument, and according to the rule stated, its introduction under the sanction of the Court, was palpably erroneous.

If all the employers of the defendant in error, had taken their children from his school, he would have been left without scholars, and of necessity, must have ceased teaching. Those who did so, indicated that they were willing to dispense with his services, as much as if they had so informed him; and to excuse the non-performance of his contract, it was only necessary to obtain the consent of those who were willing to continue him as a teacher. This conclusion, we think too clear to require argument to prove it. If the scholars were taken from the school in consequence of sickness, or other cause, of a temporary nature, and under circumstances not to show, that their withdrawal was intended to continue for the entire term of the employment; then the defendant would not have been excused without the consent of all his employers, unless he could prove without reference to the appearance of the act, that the intention was to dispense with his services.

In the case before us, the plaintiff alleges in the declaration, the performance of his contract, and seeks to recover the entire sum agreed to be paid him in consideration thereof; while he attempts to show an excuse for its non-performance, so as to entitle himself to recover for the period during which he was actually employed.

It is an acknowledged rule in the law of pleading and evidence, that the *allegata* and *probata* must correspond. Under the influence of this rule, it has been held, that where an averment of performance is necessary, the plaintiff must not only aver, that he was ready, and did all he could to perform his undertaking; and if he relies upon an excuse for a failure

he must allege the particular circumstances which occasioned a non-performance. Coppice v. Hurnard, 2 Saund. Rep. 129; 2 East Rep. 145; 1 H. Bla. Rep. 287; 4 East Rep. 147. But if the defendant has prevented a performance, under such circumstances as would entitle the plaintiff to recover as much as he would, had the contract been entirely executed on his part, then perhaps it may be unnecessary to allege in the pleading any matter of excuse. 5 B. & C. Rep. 638; 2 D. & R. Rep. 347. See further on this point, Poague v. Richardson, Litt. Select Cases, 134; Holt v. Crume, Litt. Select Cases, 499.

This view disposes of the questions of law arising upon the record. We will not inquire whether the defendant in error may not recover for all the time he was engaged in teaching, or what form of declaration is necessary to let in his proof. These are questions which he must determine for himself, at least for the present.

The judgment of the Circuit Court is reversed, and the cause remanded.

HUNTINGTON AND SIMS V. THE BRANCH BANK AT MOBILE.

1. When a note is signed in blank, for the purpose of being filled up for a particular amount, and to be used in a particular mode, and it is filled up afterwards for a different sum, or employed in a different manner, a *bona fide* holder or purchaser may recover on it, although he knew it was signed in blank, if ignorant of the purpose for which it was made.
2. The Bank can not recover, by motion, on a note payable to *Andrew Armstrong, or bearer*, without a transfer of the legal interest, or an averment showing that it was made to the Bank, by that name, &c.

Error to the County Court of Mobile county.

THIS was a proceeding by motion, in the Court below, by the Bank, against the plaintiffs in error, upon a note payable to Andrew Armstrong, or bearer, and upon issue joined, the plaintiff obtained a verdict and judgment.

From a bill of exceptions taken pending the trial, it appears that the defendants proved that the note sued on, was executed by them in blank, upon the representation, that it was to be used in the extension of the debt of a Mrs. Nancy Lee, and that other persons were mentioned as names which would be obtained on the same paper; that the blank was afterwards filled up in the presence of the officers of the Bank, to extend the debt of one Anderson West, who also signed the note.

Upon this evidence, the Court charged the jury, that an individual who gives another his name in blank, thereby constitutes such person his attorney, with authority to use such blank for any purpose and for any amount he may think fit. That if the Bank took the note in good faith, without notice of any unfairness or fraud, they were entitled to recover though Lea & Langdon, at whose instance the blank was thus filled up could not.

The defendants counsel moved the Court, to charge the jury, that if they shall believe that at the time the note was accepted from Lea & Langdon, they had no authority to bind the defendants; and the Bank agreed to receive the note before the blank was filled up by Lea & Langdon; and the Bank agreed to receive the note before the blank was filled up by Lea & Langdon, and the Bank had notice at the time it was received from Lea & Langdon, that the note was written over the blank signatures of the defendants, in the custody of Lea & Langdon, the Bank cannot recover. And also, that if the jury shall believe the note was agreed to be accepted by the Bank, before it was filled up by Lea & Langdon, as to the amount, and the Bank had notice that the amount was not filled up, and had notice of the manner in which the same was done by Langdon, in the Bank, without the privity or presence of the defendants; the Bank cannot recover. These charges the Court refused to give, and the defendants excepted to the charge given, and to those which the Court refused to give.

From this judgment, the defendants prosecute this writ of error, and assign for error.

1st. The matter of the bill of exceptions.

2d. That the plaintiff had not such an interest in the note, as to sustain a motion on it.

MR CAMPBELL, for plaintiff in error—cited, 3 Pickering, 322; 16 ib. 381; 10 Wendell, 93; 17 ib. 238; 5 Cowen, 336; 6 Mass. 300; 5 Taunton, 529; 5 Cranch, 142.

LINDSAY & LINEBAUGH, contra—cited, Doug. Rep. 496; 1 H. Black. 313; 4 Campbell, 97; 1 M. & S. 87; 2 ib. 90; 5 Taun. 529; 13 East, 517; 5 Cranch, 142; 7 Cowen, 336; 4 Mass. 45; 1 Dana, 82; 2 Dana, 142; 5 ib. 258; 3 Stewart, 247; 8 Porter, 297; 1 Ala. Rep. N. S. 18.

ORMOND, J.—Upon the questions of law, arising out of the bill of exceptions, it is impossible we think, to distinguish this case from the case of *Herbert v. Huie*, 1 Ala. Rep. 18. The counsel for the plaintiff in error, concedes, that if the note in this case, had been filled up by Lea & Langdon, to whom it was intrusted, and the Bank had acquired an interest in it, without a knowledge of the fact, that they had violated the trust reposed in them by the plaintiffs in error, that the Bank could recover; but as the Bank had knowledge that the note was in blank, it was bound to inquire into the authority of the agent to fill it up for the particular purpose, and for the amount inserted in it; yet that was precisely the predicament of the case referred to in 1 Ala. Rep. There, the note was not filled up by the agent, but the blank, in violation of the faith reposed in him was handed to a third person, in payment of his own debt, by whom it was filled up for the amount due from the agent. The Court held that in such a case, “an implied authority was given to the holder to fill up the note with any amount he may have advanced on it in good faith, and without the knowledge of any fact which might lead to inquiry and expose the fraud.”

The principle here decided, is fully sustained by the cases referred to by the counsel for the defendant in error, and by the most obvious reasons arising out of the transaction. When an individual intrusts another with his signature to a blank note, he certainly intends it should be filled up for some amount of money, and used for some purpose. If the sum of money and the object to which it is to be applied, are agreed on, it is obvious that the faith of the person intrusted with it, is relied on to carry the proposed design into effect. If he violates the trust reposed in him, who should sustain the loss? most certainly he who enabled the fraud to be practised. This is a fami-

liar principle of law, and it appears to us this is a correct application of it. The supposition that the knowlegde of the fact that the note is not filled up, should put any one taking the note on inquiry as to the authority of the agent, assumes as true, the proposition to be established. It by no means follows that the possessor of a blank signature holds it under an agreement to fill it up for a particular amount, or dispose of it in a particular mode; a much more natural presumption is, that he is vested with a discretion in relation to it, and that in the language of Lord Mansfield, in *Russel v. Langstaffe*, cited from Douglass—"it is a letter of credit for an indefinite sum." As therefore, the transaction may be what the holder of the blank represents it to be, or at least, as there is nothing in the mere possession of a blank note, which would lead to a suspicion of unfairness or fraud; with no propriety whatever, could an innocent purchaser be so affected with notice of the transaction as to put him on inquiry of the maker.

These remarks have been made because the counsel for the plaintiff in error strenuously insisted that the law was otherwise, and not from any belief that a rule of law so abundantly sustained, both by reason and authority, required an argument to support it.

But the record does not show that the Bank had the legal title to the note; without which, no action can be maintained in a Court of law. The note is made payable to Andrew Armstrong, or *bearer*, which, by our statute is in legal contemplation, a note payable to the *order* of the payee. It may be that the note is payable to the cashier of the Bank, and that by proper averments, the Bank might maintain an action on it without an assignment, but nothing of that kind appears on the record. As to this point, see the case of *McWalker v. The Branch Bank*, decided at the present term. For this error, the judgment must be reversed and the cause remanded.

TAYLOR v. POPE.

1. It appeared by a covenant executed by both parties, that P formerly had purchased two tracts of land from T; but, having failed to pay for them, the contract of sale was rescinded—T covenanting that P should remain in possession until the 25th December, 1838, at which time he was to surrender the premises; but, both parties covenanted to use their best endeavors, in the mean time, to sell the land, and if they succeeded in obtaining three thousand one hundred and fifty-two dollars, or more, P was to receive the overplus. *Held*, 1. That either party was at liberty to sell the land, provided the sum named could be obtained; but T was not obliged to part with his title until that sum was paid to him in money. 2. That T was not obliged, nor P authorised, to sell upon credit. 3. That if a new agreement was entered into, by which T agreed to receive notes, or any other thing, or to sell the land on a credit, this agreement could not be subjoined to a covenant, so as to authorise a recovery for the damages consequent on the breach of the new agreement, in the suit on the covenant. 4. That to entitle P to recover damages of T, for not using his best endeavors to sell the land, it must appear that more than three thousand one hundred and fifty two dollars could have been obtained by T; as otherwise, there could be no overplus, and P not being entitled to any collateral advantages arising from the sale, in consequence of an agreement between him and the contemplated purchaser. 5. When breaches are assigned in a declaration on a covenant, and one of them is defective, no advantage can be taken by general demurrer. 6. It is error in the County Court to refuse the defendant permission to withdraw a plea; and consequently, the issue formed on it, in an action of covenant, when all the expenses incident to the issue are offered to be paid.

Writ of error to the County Court of Talladega county.

ACTION of covenant. The declaration set out the agreement of the parties at length, and it is in these words: "This indenture made and confirmed this day, between Henry Taylor of the one part, and Peter Pope of the other part, witnesseth: That whereas, Henry Taylor did sell to said Pope two certain tracts of land, lying and being as follows, to wit: The west half of the east quarter of section 5, township 21; range 4, containing eighty acres, more or less: Also, the east half of section 8, township 21, range 4, containing three hundred and twenty acres, more or less, all in the county and State aforesaid; and whereas, said Pope has failed to make payment to the said Taylor according to the contract made and entered into between them. Now, therefore, be it known, that the

said Taylor guarantees to the said Pope, a possession of the said premises, until the 25th day of December next, and no longer, at which time I, Peter Pope, do agree to surrender to the said Taylor, the said premises, together with all the appurtenances thereunto belonging: Provided, nevertheless, that we are both to use our best endeavors to make sale of said lands, and if we should succeed in selling them for thirty-one hundred and fifty-two dollars, or more, said Pope is to receive the overplus above the sum above-specified. The liberty of making sale of the said land, is limited to the time of giving possession, as above stated. Witness our hands and seals, this 24th August, 1838." And it is signed and sealed by each of the parties.

The declaration then proceeds to aver, "that the said land in the said covenant described, had been previously sold by the defendant to the plaintiff, and the latter, in part consideration for the same, had paid a large sum of money, to wit: The sum of —— dollars, and being unprepared to make the residue of the payment for said land, as had been stipulated between the parties, it was therefore agreed and stipulated between them, as by the covenant herein sued on and exhibited, will at large appear; that the plaintiff was to restore and return the possession of the said land so sold to him, to the defendant, on the 25th day of December next, succeeding the date of the covenant.— But by the substance and true intent, meaning and legal import of the proviso to the said covenant attached, the plaintiff was allowed, and the defendant was bound to use, each his best endeavors to make sale of said land; and if either the plaintiff or the defendant, should succeed in selling the same for the sum of thirty-one hundred and fifty-two dollars or more, the plaintiff was to receive the overplus, and whatever advantage might accrue or arise from such sale, over and above that sum, that being the amount still due and unpaid to the defendant, of the whole sum originally agreed to be paid by the plaintiff to the defendant for said lands, and the said proviso being intended for the benefit and indemnity of the plaintiff, for the sum he had already paid, to wit, the said sum of —— dollars aforesaid, and the lasting and valuable improvements he had made on said lands. And now the plaintiff in fact, further avers, that the said defendant has not kept and performed his undertakings and stipulations in said proviso to the said covenant at-

tached, but has broken the same in this, to wit, that he, the defendant, from the date of the said covenant to the said 25th day of December thereafter, did not use his best endeavors to make sale of the said lands therein described, so that the same might command the said sum of thirty-one hundred and fifty-two dollars, or more, and that an overplus might accrue to the plaintiff, over and above the said sum. And the plaintiff further avers, that he, the plaintiff, using his best endeavors to make sale of the said lands, as by the said proviso authorised, did make an agreement and arrangement with one McPherson, at the county aforesaid, to sell him the said lands in the covenant described, for thirty-one hundred and fifty-two dollars, the amount specified therein, which said sum said McPherson was to pay over to the defendant, with an additional agreement on the part of the said McPherson, that the said lands should be still continued in his hands as such purchaser, free and open for sale, for the benefit of the plaintiff, and that the plaintiff should be entitled to receive whatever amount the lands could or should subsequently be sold for, over and above the amount, with interest, so to be by him paid therefor. And said plaintiff avers that the said lands could have been sold under such arrangements and agreements, for a much larger amount than was to be paid by said McPherson, to wit, for the sum of two thousand dollars more, to which the plaintiff would have been entitled, and of all which said agreement and arrangement with the said McPherson, and the extent to which plaintiff's interest would be advanced thereby, the defendant had notice and perfect knowledge, and did in fact consent to ratify and confirm the said sale and arrangement. But fraudulently and unjustly intending to injure and oppress the plaintiff, the said defendant did refuse to ratify and confirm said agreement and arrangement with the said McPherson, as made by the said plaintiff, though the said McPherson offered to fulfil the same on the — day of —, 18—, and thereby utterly defeated said sale, to the great injury of the said plaintiff; all which was between the date of the said covenant and said 25th day of December, at which time the privilege of selling the said lands was to expire.

And the plaintiff further avers, that the defendant could have sold said lands to divers individuals, if he had used reasonable

diligence so to have done, to wit, at the county aforesaid, within the period in the said covenant specified, to wit, to ——— for the sum of five thousand dollars, and to ——— for the sum of five thousand dollars, which would have yielded an overplus for the benefit of the plaintiff, over and above the said sum of thirty-one hundred and fifty-two dollars, of 1848 dollars. Yet the said defendant fraudulently and unjustly failed to do so.— By reason of which several breaches, the plaintiff says he is injured and has sustained damage to the value of four thousand dollars ; whereupon he sues.

The defendant demurred to this declaration, but his demurrer was overruled. He then pleaded,

1. *Actio non*, because he says that he has well and truly kept and performed his covenant in all things, according to the true intent and meaning thereof, and hath not committed the breaches thereof, in manner and form as the plaintiff hath alleged, and of this he puts himself upon the country.

To this plea, the plaintiff first demurred, and after his demurrer was overruled, joined issue to the country.

2. And for a further plea to the first breach assigned in said plaintiff's declaration, the said defendant says *actio non*, because he says that no sale of the said land was ever made, or could have been made, with the said McPherson, as therein averred, for the sale of the land to him, and the payment of the sum of thirty-one hundred and fifty-two dollars *in money*, by him, the said McPherson, to the defendant in manner and form as the said plaintiff has alleged, and of this he puts himself upon the country.

To this plea the plaintiff demurred, and his demurrer was sustained.

3. And for a further plea, said defendant says *actio non*, because he says he did use his best endeavors to make sale of the said land, as by the stipulations of the said covenant, he had undertaken and agreed to do according to the true intent and meaning of the said covenant, and of this he puts himself upon the country.

The plaintiff demurred to this plea, and after his demurrer was overruled, he then joined in the issue.

4. And for a further plea to the whole declaration, the said defendant says *actio non*, because he says, that at no time since

the making of the said covenant, could the said land in the said declaration mentioned, have been sold for thirty-one hundred and fifty-two dollars *in money*, as the said plaintiff in his declaration hath alleged, and of this he puts himself upon the country.

To this plea the plaintiff replied, *precludi non*, because he says, that after the making the said writing sued on, he did then and there, in the county aforesaid, between the time of making the same, and the 25th day of December, 1838, make a covenant with Col. McPherson, for the sale of the land mentioned in the writing sued on, of which writing he craves oyer, &c. for the sum of thirty-one hundred and fifty-two dollars, to be paid in cash notes, which said cash notes the defendant did then and there agree to receive of McPherson; and the defendant consented and agreed to said contract of sale, and for the further consideration, that plaintiff was to have the possession of the said lands, and the same were afterwards to be sold, and the plaintiff was to have the overplus of the said sale money, over and above the sum of thirty-one hundred and fifty-two dollars, and interest; which said contract, in all its stipulations, was then and there agreed to by the defendant, but afterwards the defendant, in the county aforesaid, did refuse to receive the said cash notes, and to satisfy the said sale; and this the said plaintiff is ready to verify.

To this replication the defendant demurred, and the demurrer was visited back on his plea, which was held to be bad, and insufficient to bar the plaintiff of his action.

5. This plea is the same as the fourth, except that the words, *in money*, are omitted.

To this the plaintiff replied, that the land mentioned in the writing sued on, and in the declaration, could have been sold within the time mentioned, for thirty-one hundred and fifty-two dollars, as he has alleged in his said declaration, and this he is ready to verify.

On this replication, issue was joined to the country.

6. This plea is the same as the second, except that the words, *in money*, are omitted.

On this plea, issue was joined to the country; at least, such is the inference from the recital of the judgment entry, which states that issues were joined on a rejoinder, to a replication to this plea, but no such pleadings appear on the record.

The cause was submitted to a jury on the several issues thus formed, and a verdict was returned for the plaintiff, on which judgment was rendered.

In the progress of the trial, the defendant asked leave to withdraw his fifth plea, as the issue formed on the replication to it, was immaterial; the defendant tendered the costs of the motion. The Court refused to permit him to withdraw it, and he then excepted.

In the further progress of the trial, the plaintiff introduced one McPherson, and offered to prove by him, that after the execution of the writing sued on and described in the declaration, the defendant agreed verbally with the plaintiff and McPherson, to receive notes, to be endorsed by the said McPherson, to the defendant, in substitution of that part of the written contract, to sell the land therein mentioned, for thirty-one hundred and fifty-two dollars; and that at the time appointed by them, McPherson was ready, and offered to endorse the said notes, but the defendant refused to accept them. To the introduction of this evidence, the defendant objected, but the Court admitted it, whereupon the defendant excepted.

The plaintiff then offered to prove by McPherson, that some time after the agreement sued on, was executed, the defendant and the plaintiff came to the house of the witness, and it was thereupon agreed, between them and the witness, that the latter should pay over and indorse to the said defendant, good notes, for the sum of \$3,152, and the defendant agreed that he would receive the same in lieu of the debt due to him from the plaintiff. These notes were to be endorsed by the witness to the plaintiff, under the understanding between themselves, to which the defendant was not privy, that witness was to have a return to the amount, with interest, and the defendant was to keep the land, or sell it for his own advantage. To the introduction and admission of this evidence, the defendant objected, but his objection was overruled: whereupon, he excepted.

The plaintiff introduced a witness, and offered to prove by him, the value of the improvements made on the land by the plaintiff. To the admission of this evidence, the defendant objected, and on its admission by the Court, he then excepted.

The plaintiff then proved by the witness, that on the said

land, there was a comfortable house, and about seventy-five acres of cleared land. The plaintiff's counsel asked what would be the yearly value of such a house to a man situated as the plaintiff was, and with such a family. To this question the defendant objected, but it was allowed to be asked; and the defendant excepted.

The plaintiff then proved by another witness :

1st. The yearly value of the premises.

2d. The actual and entire value of the same.

3d. That by the original contract of purchase, the plaintiff had contracted to pay the defendant \$4,250.

4th. That he had paid \$1098 before the rescission of the contract.

To all of this the defendant objected, as illegal and irrelevant, but it was admitted, and the defendant excepted.

After the plaintiff had closed his evidence, the defendant proposed to demur to it, and accordingly drew up his demurer to the evidence, but the Court refused to compel the plaintiff to join in demurrer, to all which the defendant excepted.

On this state of the evidence, the County Court charged the jury :

1. That if they believed from the evidence, that Pope had made an arrangement with McPherson, to settle the \$3,152 in cash notes with the defendant, and that by this arrangement, Pope was to retain the possession of the land, and the arrangement was agreed to by Taylor; then if McPherson was ready and offered to perform his part of the agreement, and Taylor refused to perform his part, they ought to find for the plaintiff.

2. That in this case, on a sale of the land, after the making of the covenant sued on, \$3,152 or upwards, the parties were not restricted to a sale for gold or silver.

3. If they believed the defendant, within the period designated by the covenant, could have sold the land for any thing more than \$3,152, and that he failed or refused to do so, they ought to find for the plaintiff.

4. That if from the evidence, they believed the land in 1838, was worth \$4000, from this circumstance they might presume it could have been sold for more than \$3,152.

5. That the right of retaining possession of the lands by Pope, under the arrangement said to have been made with MPherson

son, is a condition over and above the sum stipulated as the minimum of the sale.

6. That the statute of frauds and perjuries has no application to the facts and testimony involved in this case.

7. That under the covenant, Pope had a right to make a contract for the sale of the land, and if Taylor refused to receive his part, that is \$3,152 in cash notes, it, (the sale) was as binding as if the land had been sold for gold and silver; that Pope had the right to receive the overplus above \$3,152 in occupying the land, or in any thing else he might choose.

The defendant excepted to these charges, and a bill of exceptions was signed and sealed at his instance.

He now assigns, that the County Court erred in each of the several judgments, in overruling his demurrers to the plaintiff's pleadings; in sustaining the plaintiffs demurrers to his pleas; in refusing permission to withdraw his fifth plea under which an immaterial issue was submitted to the jury; in refusing to compel the plaintiff to join in the demurrer to the vidence; and the several charges as given.

MOORE, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—1. The prolixity of the pleadings, and the number of questions growing out of them, as well as those raised at the trial, render it inconvenient to notice them separately; for this reason we propose to examine, very briefly, the law as applicable to this covenant, and then to make its application to the case on the record.

It appears that Pope, formerly had purchased two tracts of land from Taylor, but having failed to pay for them, the contract of sale, was rescinded: Taylor covenanting that Pope should remain in possession until the 25th December, 1838, at which time Pope was to surrender the premises, but in the meantime, both parties covenanted to use their best endeavours to sell the land, and if they succeeded in obtaining \$3,152 or more, Pope was to receive the overplus.

By the terms of this covenant, it is clear that either party was at liberty to sell the land, provided the requisite sum could be obtained; but Taylor was not obliged to part with his title until \$3,152 was paid to him in money; he was not obliged,

nor Pope; authorised to sell upon a credit. If, therefore, a new agreement was made, by which Taylor undertook to receive notes, or any other thing, or to give a credit, it could not be subjoined to this covenant, so as to authorise a recovery for the damages consequent on the breach of the new agreement, in the suit on the covenant.

My own opinion is, that as the covenant, though signed by both the parties, individually, was for the benefit of Pope, that he would be entitled to any benefit or advantage, although it might not be in money, and therefore strictly within the purview of *more* and *overplus*; but a majority of the Court consider the covenant as securing nothing more to Pope than the overplus of the consideration received by Taylor, over the sum named; they consider this to be the ordinary acceptance of the terms used, and if any thing more had been intended, it ought to have been inserted in the covenant.

2. Then to apply this law of the covenant to the record. The declaration after setting out the covenant, assigns these breaches:

1st. That Taylor did not use his best endeavours to sell the land for \$3,152 or more, so that an overplus might accrue to Pope.

2d. That Pope made an agreement for the sale of the land to one McPherson, for \$3,152, to be paid to Taylor, and was also to be allowed by McPherson, all the benefits of a subsequent sale after refunding that sum and the interest, which would have benefitted Pope, \$2000; that this agreement was communicated to, and assented to, by Taylor, who afterwards refused to comply with it.

3d. That Taylor, by the use of reasonable diligence, could have sold the land for \$5000, whereby an overplus would have accrued to Pope. This declaration would be considered bad on special demurrer, in consequence of the attempt to introduce a new contract under this covenant, as is clearly the case in the second breach; and according to the opinion of a majority of the Court, the first breach is defective also, because, if Pope was only intitled to the overplus above \$3,152, it was necessary to shew that more could have been obtained. But we are all of opinion that the demurrer was properly overruled, because it is general. The objection is one which cannot be

reached, since special demurrers have been abolished. *Evans v. Watrous*, 2 Porter, 328; *Castles v. McMath*, Ala. Rep. N. S. 326.

The second plea, is an answer to the second breach assigned, and although the word money is introduced, this does not disclose any new matter, because such is the legal effect of the averments, with respect to the agreement asserted to have been made with McPherson. The plea, then, is a denial of the declaration and presented, a proper issue, which should have been sustained.

The fourth plea, is in substance a denial of the first and third breaches; and the replication to it sets up a new contract, which is a departure from the declaration. The replication, therefore, should have been overruled, and the plea sustained.

An issue was already formed when the fifth plea was pleaded, and the only replication proper to it was a *similiter*; but according to the opinion which has previously been stated, as that of a majority of the Court, it was immaterial to Pope if a *larger* sum than \$3,152, could not be obtained. The defendant wanted to withdraw this issue from the jury, and we all concur that he should have been permitted to do so, as its trial in an action of this nature, could only tend to embarrass the case. That there may be cases in which a party would not be permitted to withdraw a plea, is a question which need not be decided; it is sufficient to say, that if there are such, this is not one of them. The evidence given by McPherson, established a contract entirely different from that contained in the covenant, and the declaration, and ought therefore to have been rejected.

Without separately examining the other evidence, in this place, we shall content ourselves with remarking, that it is all inconsistent with the law of the case, as we have heretofore stated it.

With respect to the charges given to the jury, none can be sustained, except the third.

As the view we have taken, will probably be decisive of this controversy, we omit to determine the question presented on the record, with respect to the demurrer to the evidence; remarking, that the defendant has already attained all the benefit he could, by considering that the County Court also erred, in this particular.

Let the judgment be reversed and the case remanded.

SADLER, SURVIVING PARTNER, &C. V. FISHER'S ADM'RS.

1. A plea, *puis darein continuance*, is a waiver of, and substitute for all former pleas, and must allege matter of defence arising *after issue joined*.
2. Matter which has arisen pending the suit, but before plea pleaded, is an original plea, pleadable with other pleas in bar, under the statute which allows a defendant to plead several pleas.
3. The words "payment and set off," or other brief designation of the defence, though signed by the defendant's counsel, will not be regarded as a plea; unless the plaintiff elects to treat it as such.
4. The plaintiff moved to strike out two of defendant's pleas, and took issue on one; the defendant moved for judgment on the pleas replied to; the Court did not decide upon either of the motions, and the case was tried on the issue—*Held*, that as the pleas were not mere nullities, though they were demurrable, the refusal to strike them out, on motion, or to put the plaintiff to his demurrer, was an error, under our practice, of which the defendant might avail himself.

THE defendants in error brought an action of *assumpsit* against the plaintiff in error, in the Circuit Court of Lowndes, and declared on a promissory note, of the following tenor: "On the first day of March next, we promise to pay John Fisher, or order, eight thousand seven hundred and two seventy-three one-hundredth dollars, for value received, with interest from the first January last. February 2d, 1838."

The defendant pleaded as follows: 1st. *Non assumpsit*. 2d. Set off. 3d. That there was a contract made between plaintiff's intestate, John Fisher, the payee in the note, and the defendants. That by that contract, defendants were to pay any notes of intestate, and that should be payment on this note sued on, and that defendants have paid more than the note sued on. 4th. *Solvit ad diem*. 5th. Payment, *puis darein continuance*. 6th. *Solvit post diem*. 7th. That defendants were security for Fisher, the intestate, to the Bank at Montgomery, in a sum of ten thousand dollars, and they have, since the death of the said Fisher, paid the same.

"Pleas filed, Fall Term, 1839."

"COTTRELL & POPE, for the defendants."

"And the plaintiff moves to strike out all the pleas, but the 5th plea, as that is the plea of payment, since the last continuance; and on the 5th plea the plaintiff takes issue, and alleges

that since the last continuance, said defendant has not paid said plaintiff said note, or any part thereof, and of this he puts himself on the country."

"Replication filed, Fall Term, 1839."

DARGAN, for plaintiff.

The foregoing, is transcribed from the record in the words and figures in which it there appears.

At the Spring Term of the Circuit Court, holden in 1840, the cause was submitted to a jury, who in the judgment entry, it is said, were "sworn, well and truly to try the issue joined between the parties, &c."

On the trial, the defendant excepted to the ruling of the Court. From the bill of exceptions, it appears, that the defendant moved the Court, to enter judgment for him, on his first, second, third, fourth, sixth and seventh pleas, which were not replied to by the plaintiffs, and to which issue was not consequently taken. This motion was overruled by the Court, and the defendant excepted.

It further appears, that after the plaintiffs had read to the jury, the note declared on, the defendant proved by a witness, that while the same was in the possession of the payee, the payee agreed with the defendant and his co-partner, since deceased, that he would receive in payment of the note, good paper on third persons, and that he would also receive his own notes, bills of exchange, &c. The defendant then offered in evidence, several promissory notes of the payee, and one bill of exchange, accepted by him; all of which he proved, that he owned, while the note sued on, was in the payee's possession.

The defendant also offered to prove, that himself and co-partner, had paid to the Branch of the Bank of the State of Alabama at Montgomery, ten thousand dollars, for the plaintiff's intestate, on his own paper, for the payment of which they, (defendants) were sureties; that payment was made the 13th September, 1838, though they became the sureties of the intestate, before the note sued on was made. To the admission of this evidence, the plaintiffs objected, and the same was excluded by the Court; whereupon, the defendant excepted.

And a verdict and judgment being rendered in favor of the

plaintiffs, the defendant has prosecuted a writ of error to this Court.

J. B. CLARK, for the plaintiffs in error.
COOK, for the defendant.

COLLIER, C. J.—A plea of matter, arising since the last continuance, as it is technically called, is a waiver of, and substitute for, all former pleas. 6 Dane's Ab. 31. Stephen on Plead. 65; Kimba v. Huntington, 10 Wend. Rep. 675; Yeaton v. Linn, 5 Peters' Rep. 224; Wilson v. Hamilton, 4 Serg't & Rawle's Rep. 238. But there is a distinction as to a ground of defence, which has arisen *after* issue joined, and as to matter arising, pending the suit, but before plea. In the former case, the defendant must plead *pais darein continuance*; in the latter, he should show that his defence arose, pending the writ, and insist that the plaintiff should not further have or maintain his action, &c. 6 Dane's Ab. 32; Yeaton v. Linn, 5 Peter's Rep. 224; Covell v. Weston, 20 Johns. Rep. 418.

In the case at bar, the defendant designated his plea, a plea of payment *pais darein continuance*: we say designated, for it is not drawn out at length; but we know that such was not its character, because there was no issue joined or plea filed, when it was pleaded. We may then consider it as an original plea, and pleadable with other pleas in bar, under our statute, which allows a defendant to plead more pleas than one.

In Covell v. Weston, 20 Johns. Rep. 414, the defendant pleaded, *non assumpsit*, and a special plea against the further maintenance of the action, of matter arising after suit brought; no objection was made to the joining of the pleas, and the latter plea was held good on demurrer.

The plaintiff might have recognized the first, second, fourth and sixth pleas, had he thought proper, but he was not obliged to do so: That question was decided in Kelly v. Owen, Minor's Rep. 252, in which the defendant pleaded thus: "Payment and set off;" after which followed the name of his counsel. The Court said: "If these words had, by consent, been received as pleas, and issues taken thereon, we should have regarded them as such."

The third and seventh pleas, would have been bad on de-

murrer, and the question now is, should the Circuit Court have put the plaintiff to his demurrer, or was it permissible to treat them as nullities.

In *Thelusson v. Smyth*, 5 D. & E. Rep. 152, the defendant, under an order to plead an issuable plea, put in a plea, which though informal, went to the substance; it was held, the plaintiff could not sign judgment as for want of a plea, but must demur. So in *Falls v. Stickney*, 3 Johns. Rep. 541, a motion was made for judgment, on the ground that the plea, which had been put in, was a nullity. The Court said, "if a plea is bad or frivolous, the plaintiff ought either to demur to it, or treat it as a nullity, and enter a default, without any application to the Court. Had the plaintiff demurred, the defendant might have obtained leave to amend, and the motion was overruled. And in *Platt v. Robbins*, *Coleman and Cain's Cases*, 85, it was moved, on behalf of the plaintiff, that judgment by default be rendered against the defendant, on the ground, that the pleas filed, were nullities. To which the Court replied: "If pleas are not palpably bad and void upon the face of them, the opposite party must resort to his demurrer. All the Court have doubts as to one plea, and some of them as to all; and therefore, the plaintiff must take nothing by his motion."

There can be no question, that both the third and seventh pleas, are demurrable; the former, for not alleging the payment of the intestate's notes to have been made at such time, as would make their payment available in defence to the action; and the latter, in seeking to set off a demand, acquired subsequent to the intestate's death, without any contract to authorise it. But neither of these pleas can be regarded as nullities. True, they are eminently deficient in form; but the third plea discloses matter of substance, and we apprehend, could be amended in the particular we have mentioned. If this was done, and the proper commencement and conclusion given, we can discover no objection that could then be made to it.

We then, think the Circuit Court should, on motion of the plaintiff, have stricken out all the pleas of which he took no notice; should have put him to his demurrer to the third and seventh, or else should have given to the defendant, the benefit of the two latter. Had the Court have stricken out the pleas, or sustained a demurrer to them, the defendant might have ob-

tained leave to amend, and thus have presented his entire defence for adjudication. But the Court, disregarding the motion, both of the plaintiff and defendant, gave no judgment upon the pleadings.

The record clearly indicates, that the case was tried, under an impression by the Court, and the counsel for the plaintiff in error, that the plea of payment, *puis darein continuance*, was technically pleaded, and waived by operation of law, all other pleas. This notion, we have seen, was not well founded; the character of the plea, was not such as was supposed, and might have been interposed with other grounds of defence.

We will not say that where the defendant pleads several pleas, and goes to trial without objection, on an issue taken on one, that he can be afterwards permitted to object, that all his pleas were not disposed of: such is not the present case. No consent was given nor can it be implied; but the defendant urged the Court to a decision on his pleas.

In *Bondurant, et al. v. Woods & Abbott*, 1 Ala. Rep. N. S. 543, which was a proceeding against a sheriff and his securities, for the failure of the former to return a writ of *fieri facias*, by consent of parties, the cause was submitted to the Court for its decision, and a judgment rendered for the plaintiff. This Court intimated the opinion, that by submitting the case to the Court, the defendants had waived a demurrer which was found in the record to the notice; and as the demurrer was not sustainable, the omission to dispose of it, was not error. That case, it will be seen, has no analogy to the present, but was decided upon reasoning entirely unlike that, which must control our judgment now.

To conclude, we are of opinion, that the failure to dispose of the third and seventh pleas by the Circuit Court, was an error; and its judgment is reversed, and the cause remanded.

PETERS v. HEYDENFELDT.

1. Where the declaration shows that the action is founded on a contract for which the estate is not chargeable, and for which the administrator is personally responsible, the addition of "administrator" to the name of the defendant in the writ and declaration, will be considered a mere description of the person.

Error to the Circuit Court of Tallapoosa.

THIS was an action of assumpsit, by the defendant in error, against the plaintiff in error, as administrator of William Bryant.

In the declaration, the defendant is charged as being indebted to the plaintiff, for the work and labor, care and diligence of the plaintiff, as attorney and counsellor at law of the defendant, in prosecuting, defending and soliciting divers causes, suits and business, for the defendant, as administrator of William Bryant, and for fees due him in respect thereof.

The second count, on a *quantum meruit*, charges the services to have been rendered for the defendant, and upon his retainer in and about the prosecuting, defending and soliciting divers other causes, suits, &c. connected with, and arising from his administration of the estate of William Bryant, &c. and being so indebted, &c.

The defendant failing to appear, a judgment by default was taken, and writ of inquiry awarded, and the jury having returned a verdict in favor of the plaintiff, for nineteen hundred dollars. Judgment was rendered against the defendant *de bonis propriis*, from which he prosecutes this writ of error, and assigns for error,

1. That the suit is against the plaintiff in error, as administrator, and the declaration does not show any liability of the estate.
2. The judgment does not follow the writ and declaration.

JOHN H. PETERS, for plaintiff in error.

JOSHUA L. MARTIN, contra.

ORMOND, J.—The declaration shows very conclusively, that the action is founded on a contract made by the administrator, by which the estate could not be charged in this action, but for which he is individually responsible. The addition of “administrator,” to his name in the writ and declaration, cannot vitiate, as for the reasons given, the declaration shows that he was not sued in that capacity. The addition, therefore, is a mere description of the person, and will not vitiate. It follows from this, that the judgment below was correct, and it is therefore affirmed.

THE BANK OF MOBILE v. HUGGINS, adm'r of VEDDER, survivor
of BLAIR & VEDDER.

1. When there are several counts to a declaration, a general demurrer to the whole can be sustained, only in the event that there is a misjoinder of actions if any one of the counts, are sufficient.
2. Whenever a contract includes a bailment, and it is broken by the *bailee*, either case or assumpsit may be brought by the *bailor*. A count, setting out a contract, to perform specific acts, with respect to a note deposited for collection, and showing a breach of the contract, is a declaration in assumpsit.
3. When a note is deposited with a Bank for collection, and no special agreement is made, the contract to be implied, is one of agency; and no other duties are imposed by law, on a Bank, different from those imposed on any other agent. The first duty of an agent, in such a case is, to follow his instructions; if none are given, it is his duty to present the note at the time and place fixed for payment; or if no place is designated, to use due diligence to make a demand; if payment is refused, it is then his duty to give immediate notice to his principal, that he may take the measures necessary for his own security. These duties are imposed by the general law of agency; but others may arise out of local laws; as if damages are given on the protest of a note; or if a protest is essential to fix the liabilities of other parties.
4. In the absence of any local custom, it is not incumbent on the agent to notify the indorsers, unless he is directed by his principal to do so; nor to cause the note to be protested, unless this is necessary to fix the liability of other parties; or to give his principal some advantage, which, otherwise, the law would not accord to him.
5. An agent, in case of a neglect of duty, is liable to nominal damages upon the breach of his contract, and if any loss has been sustained by the principal, in consequence of the neglect, he is liable to the actual loss incurred, but not to any greater extent.

6. The discharge of a solvent party to a note, in consequence of an act of negligence, by the agent, is not an *actual loss*, when there are other solvent parties who remain bound to the principal; and it rests with the principal to show, before he is entitled to recover the amount of the note as damages, that the parties who remain bound to him, are unable to pay.
7. An agent is not liable for an omission to notify the indorsers of a note, deposited with him for collection, unless he is instructed to do so; or unless he omits to inform his principal of the default.
8. When a note is withdrawn by the owner from the Bank, where it was deposited for collection, the Bank is not discharged from its liability to damages, if it has omitted to give notice to the principal, of the non-payment.
9. When a note is deposited with a Bank for collection, and an entry is made on the bank book of the depositor, the contract of agency is not waived or rescinded, by cancelling the entry in the bank book. The only effect of such a cancellation is, to show that the note has been returned to the depositor, who is authorised to deal with it as he pleases.

Writ of error to the Circuit Court of Mobile county.

ACTION of *assumpsit*. The first count of the declaration is on a special contract, between the Bank of Mobile and Blair and Vedder, by which the Bank, in consideration that Blair and Vedder would deposit in its custody a certain note, then running to maturity, made by one Roberts, and endorsed by one Mayrant, and also by Blair and Vedder, who owned it, promised and undertook, that the Bank would cause the note to be presented for payment, and demand the same at the place where it was made payable, on the day provided for payment, and, in case the same was not paid, to protest it in due course of law. The breach of this contract is alleged to be, that the Bank did not demand payment; nor cause the note to be protested, and give notice of the non-payment to Blair and Vedder.

The second count describes the contract as one, to place the note in the hands of a notary, to be protested, if payment was not made on the day it became due. The breach is assigned, that the Bank did not cause the note to be placed in the hands of a notary, whereby the Bank became liable to pay. &c. concluding with a *super se assumpsit* for the amount of the note.

The third count is a general one, including the common counts, for goods sold, money lent, paid, had and received, and due on account stated.

The defendant demurred generally to the whole declaration; but the demurrer being overruled, the plea of *non assumpsit*

was pleaded, and on this issue, the cause was tried by a jury, who returned a verdict for the plaintiffs, on which judgment was rendered for the amount of the note, and interest.

In the course of the trial, a bill of exceptions was sealed, at the instance of the Bank, which discloses that the plaintiffs offered evidence tending to prove that the note was deposited with the Bank of Mobile for collection; and that the Bank failed to have it protested; and also failed to give notice to Mayrant, the indorser.

It was also proved, that the note was indorsed first by Mayrant; second, by Blair and Vedder; that in consequence of a mistake on the part of the officers of the Bank, with respect to the time when the note became due, no steps were taken to notify the indorsers. There was no evidence that the indorsers were notified; or that notice of the non-payment was given to Blair and Vedder.

1. The Circuit Court charged the jury, if the Bank received the note for collection, then it was the duty of the Bank to cause notice to be given to the indorsers; and if the indorser, Mayrant, was discharged, in consequence of the failure of the Bank to take measures to charge the indorsers, by notice of the non-payment of the note, then the Bank was liable.

2. The defendant gave in evidence, facts, tending to prove that Mayrant, the indorser of the note, was insolvent at the time when the note became due; and, on this evidence, requested the Court to charge the jury, that if Mayrant was insolvent, the plaintiffs had sustained no damage by the failure of the Bank to give him notice; and in that event, the plaintiff could not recover without proving damages. This charge was refused, and the jury were instructed that the insolvency of the indorser did not preclude the plaintiffs from maintaining the action; that the jury must determine the damages from a consideration of the whole of the evidence, and if the plaintiffs made out their case, they were entitled to nominal or full damages, as the evidence warranted.

3. The defendant requested the Court to charge the jury, that protest of the note, and notice to the maker, not being necessary, the plaintiffs could not recover without showing that the maker was insolvent. This was refused by the Court.

4. The defendant offered evidence, tending to show, that the

note was received from the Bank, by Blair and Vedder, soon after it became due, and that it was by them deposited with an attorney for collection; that it remained in the hands of the attorney for several months; after which, it was offered to the Bank, and payment demanded; it was also proved, that the receipt on the bank book of Blair and Vedder, where the note was entered, was cancelled. The defendants requested the Court to charge the jury, if they believed that Blair and Vedder took the note from the Bank, and held and used it as their own, for several months, and then, for the first time, returned it to the Bank and demanded payment, the Bank, in such event, was not liable.

The Court refused to give this charge, as asked for, but instructed the jury, that the Bank, by assuming to collect the note, had engaged to give notice to the indorsers, or to the plaintiffs; that if the Bank failed to give this notice, it made itself liable; that if the plaintiffs, after receiving the note from the Bank, had received payment thereof, either in part, or in full, the defendant might show it, and reduce the damages to the extent of the payment.

5. The Court refused to charge the jury that the Bank was not liable, if the plaintiffs, when they received the note from the Bank, cancelled the receipt which it had given for the same.

6. The Court also refused to charge the jury that the plaintiffs could not recover, if Mayrant, the indorser, was insolvent, when they offered to return the note to the Bank.

7. And further refused to charge the jury, that the plaintiffs should not have received the note from the Bank, if they intended to hold the Bank liable.

The defendant excepted to the several charges given, and refused to be given.

The Bank now prosecutes this writ of error, and here assigns as causes of reversal, that the Circuit Court erred:

1. In not sustaining the demurrer to the declaration.
2. In the several charges given and refused.

GAYLE, for the plaintiff in error, insisted that the special counts were substantially counts *in case*, and therefore, could not, properly, be joined with the common counts in *assumpsit*. The instructions given the jury, contemplate the Bank as liable

for the *amount* of the note, in consequence of the failure to protest and give notice to the indorser. But it is clear, that the liability was only to the extent of the damages *actually sustained*; and not even those if the contract was determined by the cancellation of the receipt given by the Bank.

CAMPBELL, contra, contended, that the instructions given were substantially correct; they assume, that as the Bank undertook the collection of this note, it became liable by the omission to notify the endorser, or the plaintiffs. The extent of the liability was not determined by the Court, but was, on the contrary, left to the jury to be determined by them, from all the circumstances. This view is fully sustained by many cases. *Smedes v. Bank of Utica*, 20 John. 372; S. C. on error, 3 Cowen, 663; *McKensler v. Bank of Utica*, 9 Wend. 46; S. C. on error, 11 ib. 473; *Bank at Montgomery v. Knox*, 1 Ala. Rep. N. S. 148.

The Bank, by its omission to give the necessary notice, made the note its own, and became liable to the plaintiffs *for the whole amount*, if any solvent party was discharged by the negligence. *Prichard v. The Louisiana Bank*, 2 Louis. Rep. 415; *Durnford v. Pattison*, 7 Martin, 460; *Miranda v. The City Bank*, 6 Louis. Rep. 741; *Crawford v. Louisiana State Bank*, 1 Martin, N. S. 214; *Montillet v. Bank U. S. ib.* 365; *Bank of Washington v. Triplett & Neele*, 1 Peters, 26.

Here, it was shewn, that a party able to satisfy the note, was discharged; and if the maker of the note was solvent and able to pay, it was incumbent on the defendant to show the fact in mitigation of damages, when it is conceded that this evidence could properly be received for such a purpose. *Crawford v. Louisiana State Bank*, 1 Martin, N.S. 214; *St. John v. O'Connell*, 7 Porter, 466; *Trotter v. Crockett*, 2 Porter, 410.

All the charges which were requested by the defendant, with regard to the main question, assume that the Bank was not *liable*, if any of the parties to the note were solvent. The liability was incurred when the Bank omitted to give the notice, and no proof of actual damage was necessary on the part of the plaintiffs. *Allen v. Sudam*, 17 Wend. 368; *VanWart v. Woolley*, 3 B. & C. 439; S. C. at *Nisi Prius*, 5 M. & M. 526; 1 *Livermore on Agency*, 398. If the Court had been requested to instruct the jury as to the *extent* of the liability, the ques-

tions now argued might have arisen; but, as no such request was made, the Court was right in refusing the instructions in the terms they were demanded.

The judgment of the Circuit Court was reversed at the last January term, but a re-hearing was afterwards allowed, on the application of the defendants in error. At this term, the case was re-argued by CAMPBELL for the defendant in error.

GOLDTHWAITE, J.—1. As the demurrer is a general one to the whole declaration, according to the established course of practice, it can be sustained only in the event, that all of the several counts are defective; or unless there is a misjoinder of actions. *Pettigrew v. Pettigrew*, 1 Stewart, 580. A critical examination into the correctness of the special counts, is unnecessary, because, if these were admitted to be defective, the result would not be varied, so far as regard is had to the judgment on the demurrer, inasmuch as the common counts, against which no objection is made, are sufficient to sustain the declaration, if there is no misjoinder.

2. Whenever a contract includes a bailment, and it is broken by the *bailee*, either case or assumpsit may be sustained by the *bailor*, at his option; if he declares in case, the fraud or negligence of the *bailee* constitutes the *gravamen* of the charge; if in assumpsit, then the promise and undertaking, with its breach, constitutes the ground of the action. 1 Chitty Plead. 153, and cases there cited. On looking into the special counts, we find each of them to contain the distinct averment, of a contract to perform specific acts, with reference to a note deposited for collection; and it is averred, that these acts have not been performed. We think it very clear, that both these counts are in assumpsit, and not in case; consequently, the objection of a misjoinder of actions, is not supported by the record. We may remark, that one of these counts concludes with a *super se assumpsit*, for the amount of the note, but this irregularity can only be reached by a special demurrer, as enough without it would remain to make a perfect declaration.

3. The instructions given and refused to be given to the jury, are numerous, and it will be most convenient, before entering upon the particular consideration of each, to ascertain what duties were imposed by law on the Bank, when it received

this note, under the circumstances disclosed by the bill of exceptions; and then to determine what the extent of the liability arising out of a failure. It does not appear that any special agreement was entered into between the owners of the note and the Bank; but the contract is to be implied, from the fact that the note was deposited or placed with the bank for collection; the note is described as having been payable at the bank.

This, then, seems to be the case of a naked agency; for there is nothing to vary the law of the case, in the fact, that the agent is a banking corporation. No other duties are imposed on such a corporation, which are not imposed on any other agent, possessing skill in the particular business entrusted to his care. What then is the duty of an agent, with whom a note is deposited for collection? His first duty, unquestionably, is to follow, with precision, such instructions as may be given to him by his principal; and in the absence of any specific instructions, he is bound to present the note at the time and place fixed for payment; or, if no place is designated by the note, to use due diligence to make a demand. If payment is refused, it is then his duty to give immediate notice to his principal, that he may take the necessary measures for his own security. Paley on Agency, 6, 37; Beame's Lex Mer. 431; Van Wart v. Woolley, 3 B. & C. 439.

Thus far the duties are imposed by the general law of agency, and the law merchant; but doubtless, other duties may arise out of local laws; as if damages are given upon the protest of a bill or note; or, if a protest is essential to fix the liability of any party to it.

4. But, in the absence of a local custom or usage, we do not consider it incumbent on an agent to notify the indorsers, unless he has particular instructions from his principal to do so. Nor do we consider it the agent's duty to cause a note to be protested, unless this is necessary to fix the liability of anterior parties, or to give his principal some advantage, which, otherwise, the law would not accord to him. It is true, that the contrary of this seems to have been settled by the Supreme Court of New York, in *Smedes v. The Utica Bank*, 20 John. 372; S. C. on error, 3 Cowen, 663; and also in *McKensler v. The Bank of Utica*, 9 Wend. 46; S. C. on error, 11 Wend. 473.

In the case first cited, the evidence showed a local custom,

that the Banks notified all the indorsers ; but the Court considered this to be the general law of agency. The same doctrine has also been held by the Supreme Court of Louisiana, in a series of cases, which we shall hereafter take occasion to examine, in connexion with another aspect of this case.

We are reluctantly compelled to differ from these Courts, because, it seems obvious to us that local custom has been considered by them as the general law of agency. If it be true, that an agent, or even a notary, is bound by law, without instructions, to give notice to the indorsers of a note, the inquiry might be made—how is the residence of each of them to be known to him ; and, if not, from whom is he to derive the necessary information, to enable his action to be efficient for the security of the holder, and for indemnity to himself ? In the very nature of things, there are matters, of which the agent and notary, both, may, and oftentimes must, be entirely ignorant ; and to impose upon either of them the necessity of ascertaining facts, with certainty, would be an intolerable burthen. Independent of the fact, that these decisions are in direct conflict with the elementary writers, Beames and Paley, whose writings have almost the weight of adjudication, they are adverse to the opinions, of some at least, of the most distinguished jurists of our own country. Chief-Justice Parsons, says “ a person appointed a factor, to cause a bill to be presented, is intrusted with no other powers, and it is his duty to notify his principal. The factor may not know to which of the prior parties the principal intends to resort ; and, if he does, he may not know their domicils ; as he has no interest in the bill, or privity with the parties.” *Colt v. Noble*, 5 Mass. 157. The contest in that case was, between the holder and the indorser of a bill, the latter claiming to be discharged, because notice of the dishonor of the bill was not given to him by the factor ; and when if it had been so given, it would have reached him some *months* sooner than it did from the holder, who resided at Madras. The same doctrine is held in the case of *Tunno v. Lague*, 2 Johns. Cases, 1.

5. The duty of an agent, with respect to a note deposited with him for collection, being thus ascertained, the more important question arises as to the *extent* of his liability, in case of default. It is apparent, that a mere agency is created when a

note is deposited for collection, and we find it difficult to imagine any circumstances which can cast on one standing in this relation, a liability to a greater extent than the actual amount of injury sustained by the principal. To permit a recovery for more, would be to inflict damages on the agent, as a penalty for his misconduct merely; and beyond the damage sustained, the principal would seem to have no better title than an indifferent person.

It is well observed by one of our own elementary writers, that "the loss which the principal has sustained, by reason of the negligence of his agent, is to be taken as the true measure of damages, in an action founded upon that negligence. This appears to follow from the very definition of damages, they being a recompense given by the jury for the wrong or injury done to the party." 1 Livermore on Agency, 398. The same principle seems to have furnished the rule for the decision in the case of Russell v. Palmer. 2 Wilson, 325. The defendant, as the attorney of the plaintiff, had recovered a judgment against a debtor, and omitted to charge him by a *ca. sa.* after he had been surrendered by his bail; in consequence of which he was superseded. The action was *case*, for the negligence, and it was ruled by the Judge who tried the case, that the defendant was liable for the whole debt; but the Court awarded a new trial on account of the misdirection, because the action sounded merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit. On the last trial, the jury found only £500, (the debt was £3000,) *as it appeared the debtor was not perfectly insolvent.* Now, it seems to be evident, from this case, that if the plaintiff, notwithstanding the debtor had been discharged from custody, by the negligence of the defendant, could by *fi. fa.* have obtained satisfaction of his judgment, nominal damages merely would have been given.

In the case before us, can the owner of the note be said to have sustained any more than nominal damages, if he has a perfect remedy on it against a solvent party?

In the case cited from Wilson, the plaintiff had two remedies; one by *ca. sa.*, which, by the common law, was a *satisfaction* of the debt; and the other, was by a *fi. fa.*, which might be productive or otherwise. The debtor is discharged

from the confinement, by the negligence of the defendant, and so far as this remedy was concerned, the satisfaction was lost ; but the other remedy remained ; *and because it appeared that the debtor was not wholly insolvent*, they only found a sum much less than the debt, which sum, it is fair to presume, was that which the plaintiff could not recover by his other remedy, the *fi. fa.*

In the present case, if the maker of the note is solvent, it can not be said that the owners have sustained *actual damage*, to the amount of the note, although the indorser has been discharged. Indeed, this very question is noticed by Beames, who says "when any person has bills sent to him to procure an acceptance, with directions to return them, or hold them at the order of the seconds, &c., and the person to whom they are sent, either forgets or neglects to demand acceptance, or he suffers the party on whom they are drawn, to delay their acceptance, and the drawer, in the *interim*, fail, he is certainly very blame-worthy for his carelessness and disregard of complying with his obligation ; *though this will not subject him to the payment of their value.*" He adds, "But if he should be urged to procure *acceptance and payment* of a bill sent to him, and should protract or defer the getting it done, and the acceptant, being ignorant of the drawer's circumstances, declares he would have accepted it, had it been timely presented ; the person guilty of the neglect *will be obliged to make good the loss* that has happened to his correspondent, *purely through his omission and carelessness.*" Beame's Lex Mer.—bills of ex., fig. 18.

Some reliance is placed, by the defendant in error, on an expression of Chief Justice Marshall, in the case of The Bank of Washington v. Triplett & Neale, (1 Peters, 26.) The facts of that case were, that a bill drawn by one Briscoe, of Alexandria, on Carnes, at Washington city, payable to, and indorsed by Triplett & Neale, was sent to the Bank to procure acceptance and payment. When the bill was presented, at the residence of Carnes, for acceptance, he was absent in Baltimore. The bill was not protested for non-acceptance, and after protest for non-payment, notice was given to Briscoe, who refused to pay it. Evidence was also given, as to the incompetency of Carnes and Briscoe, to discharge the bill, at the time of its

non-payment; and that since that period, the latter had inherited an estate. The bill was dated, 19th June, 1817, payable four months after date, and was protested for non-payment, on the 24th day of October, the fourth day after that expressed on the face of the bill, as the day of payment. Judge Marshall observes: "The first prayer of the defendants, in the Circuit Court, being to instruct the jury that, upon the whole evidence the plaintiff ought not to recover; if it might properly be granted in any case, in which any testimony was offered, certainly ought not to have been granted; if any possible construction of that testimony would support the action. The liability of the Bank, for the bill placed in its hands for collection, undoubtedly depends on the question, whether reasonable and due diligence, has been used, in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett & Neale, have alleged the failure to give notice of the non-acceptance of the bill, and failure to demand payment in proper time. The counsel for the Bank, have brought the first question more distinctly into view, by a more definite instruction, which was afterwards asked respecting it, and its consideration will be deferred until that prayer shall be discussed; but the first will be disposed of under the general prayer. *Unquestionably, by failing to demand payment in time, the Bank would make the bill its own, and would become liable to Triplett & Neale for its amount.* The inquiry, therefore, is into the fact."

It is evident, we think, that the learned and lamented Judge was not preparing to discuss the general rule, but was about to enter upon the particular one, applicable to the facts of that case; for he says, the prayer ought to have been refused, *if any possible construction of the testimony would support the action.* As to the extent of the damages, under the proof, the Bank, if liable at all, were *unquestionably* so to the full amount of the bill, because Briscoe was shown to be solvent. This case, then, in our opinion, is not a decision upon the point now to be determined.

In *Van Wart v. Wooley*, 3 B. & C. 439, Lord Tenterden uses an expression similar to that of Judge Marshall, with regard to an agent to whom a bill was remitted for collection, making it his own, by omitting to give his principal notice of its non-acceptance; but the case itself explains the expression, and is a

most satisfactory authority to show that an agent, guilty of negligence, is only liable to the extent of the injury actually sustained by the principal.

Whatever influence the opinion of Judge Marshall, in the case of the Bank of Washington v. Triplett and Neale, may be supposed to have on this question, it must be borne in mind that it was pronounced in January, 1828; but in May, of the same year, we find him giving the question of agency, a full, and we may be permitted to add, a most luminous examination, and he then comes to the conclusion, that one to whom a bill is remitted, or who is in possession of a note, as agent, does not bear the same relation to his principal, that the holder of a bill of exchange does to the drawer or indorser; nor will the same negligence, or omission, that will deprive the holder of recourse, against the previous parties to a bill, make the agent subject to his principal, to the extent of the bill placed in his hands for collection. He also determines, that the relation of principal and agent, is governed by the general rules of law, founded on reason; and if the principal suffers, through the remissness or negligence of the agent, *the actual loss sustained* by the principal, in consequence of such misconduct, is the standard by which his damages must be measured. Hamilton v. Cunningham, 2 Brock. 350. See also Stow v. Bank of Cape Fear, 3 Dev. 408. It has been supposed by the counsel for the defendant in error, that the principle governing this case, was decided by this Court, in the Branch Bank at Montgomery v. Knox & Co. 1 Ala. Rep. N. S. 148, but there the *evidence* showed, that solvent parties had been discharged, and those who remained liable, were shown to be wholly insolvent.

It must be admitted, that the cases determined in the Supreme Court of Louisiana, are in conflict with what we consider to be the law. They held, that an agent is bound in the same manner, and to the same extent, as if he was a party to the bill or note; and that he is liable for the amount of the bill or note whenever a solvent party is discharged, although other parties may continue liable who are able to pay. Durnford v. Pattison, 7 Martin, 460; Crawford v. Louisiana State Bank, 1 Martin, N. S. 214; Montillet v. Bank of the United States, ib. 365; Pritchard v. Louisiana State Bank, 2 Louisiana Rep. 415, Miranda v. City Bank, 6 ib. 741. But they also held, that the defaulting

agent is entitled to a cession of the note, when a recovery is had.

It is evident, that gross injustice would frequently be wrought to the agent, if a recovery could be had against him by his principal, when there was a solvent party remaining bound, as he has no means by the common law, to compel a cession of the note, and he certainly is invested with no property in it, by the fact, that a recovery is had against him for a negligent default with regard to it; and although a Court of Equity might interfere for his benefit, that cannot alter the law. In every case of this nature, the law implies *some* damages from the breach of the contract, whether actual injury has resulted or otherwise;—*Van Wart v. Wooley*, 3 B. & C. 439. But our conclusion is, that the extent of the injury, and not the amount of the note, is the proper criterion, by which the damages are to be ascertained; and that no actual damages growing out of the loss of the debt can be said to exist, whilst there remains a solvent party, who is bound for the note. This view of the law imposes on the agent, who is in default, the liability of indemnifying his principal, against all the actual losses which have been sustained in consequence of his negligence.

6. We have now ascertained what is the duty of an agent, with regard to a note deposited with him for collection, and the extent of his liability, in the event of negligence with respect to it. It is further necessary to determine, in what manner the extent of the injury is to be made apparent to a jury.

It is pressed on us with much force, that when the plaintiff has shown the discharge of one of the parties to a note, in consequence of the negligence of the agent, this should, *prima facie*, be considered as evidence, sufficient to charge him with the amount expressed to be due by the note; and the case of *Allen v. Sudam*, 17 Wend. 368, is relied on to show that a more stringent rule has been settled in New York. In that case, the Court held, that as the jury had no knowledge what the amount of the damage was, except from the proof of the amount of the draft, they ought to find the amount of the draft. It was in evidence, however, that the draft was dated, 21st July, 1833, at two months; it was deposited with the agents on the day of its date, and they forwarded it to the place where it was payable, on the 2d of September; on the 7th, it was presented for

acceptance, and on the 10th, acceptance was refused; the draft was then protested, and returned to the agents on the 16th, who gave notice to the principals on the next day. On the 9th October, the drawer died, insolvent, he having given instructions to the drawees, not to accept, and they stating in evidence, that they would not have accepted the draft if it had been presented earlier. It will be seen that this case is, entirely at variance with the decision in *Van Wart v. Wooley*, on which it professes to be founded, for in that case, the Court of King's Bench place their judgment on the fact, that inasmuch as the drawer was not discharged by the negligence of the agent, the principal was only entitled to *nominal damages*. We cannot bring our judgments to follow the rule settled in New York, as to the ascertainment of the damages. The general rule of evidence, certainly is, that the affirmative shall be maintained by the party who is presumed to have possession of the necessary information of the fact to be established. The mere production of a paper, with a name signed to it, promising to pay a sum of money, does not import, necessarily, that the paper has any actual value. Its value depends entirely upon the ability of the parties to comply with what they have promised. The knowledge of this ability is to be presumed to be with the person who has an interest in it; and it is difficult to conceive how a mere agent, who is intrusted with the paper only for one specific purpose, in no ways coupled with any interest, can be held to proof of those circumstances on which its value, or its worthlessness, depend.

It is supposed, however, by the counsel for the defendant in error, that this feature of the case, was decided by this Court in *St. John v. O'Connell*, 7 Porter, 466. The proof in that case was, that the debtors *were solvent*; evidence was offered by the defendant, who had converted the note, that *nulla bona*, had been returned to an execution obtained on the paper converted. The Circuit Court charged the jury, that the measure of damages was the amount of the note, and interest to the time of trial; and this Court held the charge to be correct, *under the circumstances of the case*. There can be no question, we apprehend, of the correctness of this decision, but it has no tendency to support the proposition contended for.

In the case of *Stow v. The Bank of Cape Fear*, 3 Dev.

408, it was held, in an action similar to this, that the amount of the bill, is not the criterion to govern the jury, in assessing the damages, unless it appears that the plaintiffs had lost that amount of money by the misconduct of the agent. Judge Ruffin, in the same case, shows the true ground of the distinction between an action of this nature, and one against a sheriff for an escape.

If then, the plaintiff is compelled, where there is only one party liable on a bill, in the first instance, and he is discharged by the neglect of the agent, to shew what he has actually lost, we cannot conceive why he is not in the same predicament, where there are more parties than one. If there is yet a solvent party bound to pay, we repeat that the principal cannot be said to have lost his debt through the negligence of the agent, although his remedy, and right also, may be gone, as to other parties. But it is unnecessary for him to ascertain the inability of all, or any of the parties, by suit, if he is prepared to prove, at the trial, either that they are not bound in law, or are unable to pay.

7. If we now proceed to apply the law of the case, as we have ascertained it, it will be seen that the first charge given, is not in accordance with the rules previously stated by us. The instruction was, that it was the duty of the Bank, to cause notice to be given to the indorsers; and if the indorser, Mayrant, was discharged in consequence of the failure of the Bank to take measures to charge the indorsers by notice of the non-payment of the note, then the Bank was liable. It is true, that this charge is somewhat modified by the fourth, which seems to have been intended as a summing up of the law of the case, when the Court says, (in answer to a request by the Bank, to instruct the jury, that it was not liable, in consequence of the plaintiffs having taken the note from its custody and cancelled the entry in their Bank book,) that the Bank, by assuming to collect the note, had engaged to give notice to the indorsers, or to the plaintiffs, that if it failed to give such notice, it made itself liable; that if the plaintiffs, after receiving the note from the Bank, had received payment thereof, either in part, or in full, the defendant might show it and reduce the damages to the extent of the payment. But the modification assumes that the Bank became liable for the amount of the note; and that

this could only be reduced by proof, on the part of the defendant, that the whole, or a part of it had been paid. In both these particulars, there is error. But in our opinion, the charge is also obnoxious to the objection, that it was well calculated to mislead the the jury from a consideration of a fact, which it was essential for the plaintiffs to have proved, but which it is clear, was not given in evidence. We speak of the third charge which the Court refused. It was properly refused, because the Bank was liable for nominal damages, although there was no evidence of the insolvency of the maker of the note ; but as we have before stated, no actual loss has been sustained by the plaintiffs, if they have still a remedy against a solvent party to the note. This request to charge, although properly refused, when coupled with the one given in answer to the fourth, undoubtedly misled the jury, and we should not hesitate to reverse the judgment for *this*, if no other error was apparent ; and this would be in accordance with several previous decisions. *Sims v. Sims*, 7 Porter, 449 ; *Tarlton & Bullard v. supra.*

8. We do not think the Circuit Court erred in refusing to give the charges with reference to the effect of the plaintiff's taking the note out of Bank, after the omission to present it for payment. We have already shown that the Bank was a mere agent for the owners of this note, in this transaction, and the remarks made by us in the case of *The Branch of the Bank of the State of Alabama at Montgomery v. Knox & Co.* 1 Ala. Rep. N.S. 148, will apply with full force to the facts in this case. The Bank, by its breach of the contract, acquired no right or title to the note ; nor were the principals compelled to discharge it from its liability for its negligent omission, before they were entitled to the note. If the Bank had asserted such a right, and refused the delivery of the note, this would have been proper evidence, to show a conversion. As the Bank had no right to retain the note, no inference of a waiver, or of a return, can be presumed, adverse to the plaintiffs, from the fact of taking it again into their possession. It was their property, and for this reason, they had the right to do with it as they thought proper.

9. The cancellation of the receipt in the Bank book of the plaintiffs, is a matter of no importance whatever. The entry merely evidenced the receipt of the note by the Bank, and

the cancellation of this evidence only showed that the note had been returned to its original proprietors. There is nothing stated, from which an abandonment of the contract, can be properly inferred.

For the errors which we have noticed, the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

COLLIER, C. J.—I think it probable, that the judgment of the Circuit Court, may operate injustice to the plaintiff in error, judging alone from the facts recited in the bill of exceptions; but the charge of the Judge to the jury, seems to me entirely consistent with the view, which my brother, GOLDTHWAITE, has taken of the law. Taken as a whole, I think it easy of application, and consequently cannot admit that it was calculated to mislead a jury of ordinary intelligence. That the Bank was only liable to the extent of the damages sustained by the defendant in consequence of the omission to comply with its engagement, has, I think, been well shown; and so the Circuit Court instructed the jury. No question was raised, whether the mere production of the note and the omission of the Bank to give notice was *prima facie*, sufficient to charge the Bank with damages equal to its amount and interest; and the failure to charge specially, on this point, does not authorise a reversal of the judgment.

Considering the bill of exceptions not to be obnoxious to the criticism it has received, I cannot acquiesce in the judgment pronounced by the majority.

ELLIOTT V. MAYFIELD AND WIFE.

1. The record contained an order of publication, by the Orphans' Court, requiring the executor to settle, on a day designated, the accounts of his testator's estate. On the day appointed, a decree was rendered, reciting that a final settlement was made, and ordered to be recorded. The decree, after adjudging that certain sums were due to the different legatees, concludes thus: "All the above specified legacies to be paid according to the terms and conditions of the last will of said deceased, with interest from this date, to be subject to such payments as may have heretofore been made, with interest thereon from the time they were made." *Held*, that the decree was final, especially as the will did not require any thing to be done to entitle the legatees to receive their portions; and that an execution might issue under the statute, in favor of each legatee, for the amount respectively adjudged him, or her.
2. Where there are several legatees and several executors, a decree by the Orphans' Court, in favor of one or more of the legatees, against one of the executors, and in favor of other legatees against the other, even if it be irregular, is not *void*; and an execution may thereon issue.
3. The action of account, or other appropriate action at law, though given by statute, does not exclude any other statute remedy for the recovery of legacies.
4. In the execution of a will, questions may arise, which the Orphans' Court is incompetent to determine; and where a trust technically so called, is required to be enforced, a Court of Equity must be resorted to.
5. Although a *scire facias* may not have lain at common law, to revive a judgment in a personal action, where no execution had issued thereon within a year and day after its rendition, yet the long continued practice in this State, of thus reviving such judgments, before our statute upon this subject, tacitly modified the common law.
6. Upon the return of an original *scire facias*, "not found," an order was made for the issuance of an *alias sci. fa.*; and thereupon, a writ issued in form an original, with the words "*alias sci. fa.*" written at its head—*Held*, that it might be regarded as an *alias writ*; and that the defect was one of form, amendable (under the statute) on motion.
7. A *scire facias* to revive a decree of the Orphans' Court, called upon the defendant to show cause, why the decree should not be revived, &c. it was adjudged that the plaintiffs have execution of the decree, &c.—*Held*, that the order or decree upon the *scire facias* was unobjectionable.

THIS was a proceeding by *scire facias*, in the Orphans' Court of Tuskaloosa, to revive an order or decree rendered by that Court against the plaintiff in error, as one of the executors of John Spencer, sen'r, deceased.

It appears from the record, that the plaintiff duly qualified as one of the executors of the testator, in January 1827, and that on the 29th November, 1830, an order was made as follows, viz: "It is ordered by the Court, that publication be made

once every two weeks for forty days, in some newspaper printed in the town of Tuskaloosa, that the executors of the last will of John Spencer, dec'd. will be required to settle finally, their accounts with the estate of said deceased, on the fourteenth day of January next."

On the fourteenth day of January, 1831, the following entry was made: "This day the Court proceeded to settle, finally, the estate of John Spencer, sen'r, dec'd, with the executors thereof, which was accordingly done, and ordered to be recorded."

Then follows *in extenso*, the decree of the Orphans' Court, declaring the sum which each of the executors had in his hands, and directing the payment of the same to the legatees, *severally*. So much of the decree as it is material to notice, orders the plaintiff in error to pay "to Louisa Spencer, daughter of said Zilman Spencer," (whose name is previously mentioned as a son of the testator) "seven hundred and eleven dollars and ninety-seven cents." The decree then, concludes as follows: "All the above specified legacies, to be paid according to the terms and conditions of the last will of said deceased, with interest from this date, to be subject to such payments as may have heretofore been made, with interest thereon, from the time they were made."

On the 7th May, 1838, a writ of *scire facias* was issued, reciting the decree, and stating the marriage of Louisa Spencer with Isaac N. Mayfield, since the same was rendered, and calling upon the plaintiff in error to show cause why the decree should not be revived, and Louisa and husband have execution thereon. The *scire facias* is indorsed as follows: "Received 23d May, 1838, Ja's G. Blount, sheriff. By A. Lacy, D. S. Not made known, the said Edward B. Elliott, not to be found in my county. James G. Blount, sheriff. By A. Lacy, D. S." And on the fourth of June, the day of its return, an *alias scire facias* was ordered to issue, returnable on the first Monday of July thereafter. In obedience to this order, *scire facias* issued without any reference in the body of it, to that which had previously issued, but these words, viz: "*alias sci. fa.*" appear to have been written on the same page, and immediately precede the writ. This second *scire facias* is regularly returned, "not made known, &c."

On the first Monday in July, 1838, the Orphans' Court made

an order reciting the decree, and the return of the two writs of *scire facias*, which concludes as follows: "And it further appearing to the satisfaction of this Court, that at the time of rendering said decree, the said Louisa was a feme sole; and it further appearing, that afterwards, to wit, on the — day of —, one thousand eight hundred and thirty-two, the said Louisa Spencer intermarried with the said Isaac N. Mayfield; and it further appearing to the satisfaction of this Court, that the sum of money in said decree, still remains unpaid and unsatisfied, and that the said decree still is in full force, unreversed, or in anywise set aside; and that the said Louisa Spencer, before her marriage with the said Isaac N. Mayfield had not execution upon said decree, nor have the said Isaac N. Mayfield and Louisa, his wife, had execution of, or upon said decree, since their intermarriage as aforesaid. It is therefore ordered, adjudged and decreed, that the said Isaac N. Mayfield and Louisa, his wife, have their execution against the said Edward B. Elliott, executor, &c. as aforesaid, for the amount of the said decree, according to the force, form and effect of the said decree." And that they recover their costs, &c.

To revise this order for the revival of the decree, the defendant below has prosecuted a writ of error to this Court.

CRABB & COCHRAN. for the plaintiff in error, insisted: First, The decree of January, 1831, is *interlocutory*, and on it no execution could have issued in favor of Louisa Spencer. *Cherry & Bell v. Belcher*, 5 Stewt. & P. Rep. 133; *Judge of Limestone Co. Court v. Coalter*, 3 Stewt. & P. Rep. 348; *Judge of Madison Co. Court v. Looney*, 2 Stewt. & P. Rep. 70; *Moore v. Chapman*, 2 Stewt. Rep. 466.

2. The decree was extra-judicial, and consequently void; because it is against one executor, while two were acting; and because the law gives to a legatee another, and different remedy. *Aik. Dig. Sec. 29*, p. 183; 2 Stewt. & P. Rep. 72; 5 Stewt. & P. Rep. 397; *Clark v. Herring*, 5 Binn. Rep. 33; *Wilson v. Long*; 12 Sergt. & R. Rep. 58; *Toller on Ex'rs*. 495; *Aik. Dig. Sec's. 37-8-9*, p. 252. And the proceeding being to enforce the execution of a trust, the Orphans' Court had no jurisdiction. *Wyman v. Hubbard*, 13 Mass. Rep. 232; *Creagh v. Portis*, 4 Porter's Rep. 333; *Williams on Ex'rs*. 1186, 1268.

3. At common law, a *scire facias* did not lie to revive judgments in personal actions, but was given by the Stat. Westm. 2 chap. 45; 6 Com. Dig. 520; 2 Sel. Prac. 189; 2 Dunl. Prac. 1083; 2 Tidd's Prac. 1153. And no statute of this State extends the remedy to decrees of Orphans' Courts. Aik. Dig. 52, 156, 159, 273, 280.

4. The proceedings themselves are irregular. The first *sci. fa.* was returned on the 23d May, the day on which it was received by the sheriff. An order was made that an *alias sci. fa.* issue, yet the second writ purports to be an original.

5. The order made upon the *scire facias*, is erroneous, in giving to the defendant in error, execution upon the decree, instead of directing that the same be revived. The order should have stated for what sum execution should issue, and that sum ought to have been the amount of the decree, without the interest thereon, since its rendition. Aik. Dig. sec. 37, p. 252.

PECK & CLARK, for the defendants, contended,

1. The decree of January, 1831, was not only regular, but that it was final, and authorised the issuance of an execution thereupon. Whiting *et al.* v. Bank U. S. 13 Peters' Rep. 6.

2. However limited may have been the remedy by *scire facias* at common law, there can be no doubt, but it is the appropriate remedy to revive a decree of an Orphans' Court.—Aik. Dig. 252.

3. An inspection of the record will sufficiently show that the proceedings were regular, and the order of revival in conformity to law. As to any irregularity in the decree, if it be not absolutely void, it will not be noticed in a proceeding to revive.

COLLIER, C. J.—1. Judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the progress of a cause upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit; but contemplates further proceedings for that purpose. 2 Tomlyn's Law Dic. 287; Bing. on Judgment, 2, 13, L. Lib; 3 Bla. Com. 396. *Final* judgments are such as at once finish the proceedings, by declaring that the plaintiff either has, or has not entitled himself to the redress he sought, and by ascertaining what amount he shall recover.—Bing. on Judgment, 2; 3 Bla. Com. 398; 2 Tomlyn's Law

Dic. 288. Decrees are also either *interlocutory* or *final*, and their character is to be ascertained by an application of the tests we have laid down. Bouv. L. Dic. 295.

In Whiting, *et al.* v. Bank of U. S. 13 Pet. Rep. 6, a decree was rendered, foreclosing the equity of redemption of the mortgagor to the mortgaged premises, directing a sale, and a report thereof to be made to the Court by the master. It was held that that was a *final* decree, and might be appealed from; the sale and report being considered only the execution of the decree. And in Weatherford, *et al.* v. James, 2 Ala. Rep. N. S. 170, it was adjudged that a decree which settled the rights of the parties by declaring that the complainant was entitled to such an estate as one of the defendants could convey; directing partition to be made between the defendants—requiring the master to compute the amount of damages, if any, which had been paid by the complainant on a judgment at law, and ascertain other facts, was *final*.

The cases cited to this point, by the plaintiff's counsel, with the exception of Cherry and Bell v. Belcher, 5 Stewt. & P. Rep. 133, do not seem to be at all pertinent. With the exception stated, they were cases of suits on administration bonds, alleging breaches that occurred previous to 1830, but do not determine what is, or is not a final decree.

Cherry & Bell v. Belcher, was a suit in equity, by which the complainant, in right of his wife, as distributee, sought to recover one fourth of a sum of money, which the Orphans' Court ascertained to be due on settlement, by the administrators to the estate of their intestate. It was insisted that chancery had no jurisdiction of the case, or if it had, the settlement was not conclusive of the amount of the administrators indebtedness.—The Court said, "whatever might be the effect of a distinct and final order of distribution made by the County Court, awarding to each distributee, the amount of his distributive part, a mere ascertainment of the sum remaining in the hands of the representatives, even if the settlement were certainly a final one, cannot divest chancery of its jurisdiction, when applied to, by one of the distributees, to compel payment of the portion to which he is entitled." Again: "But the settlement relied upon in this case, seems to contemplate something further to be done. It does not purport to be final, but declares,

that nine hundred and twenty-six dollars and eighty-three cents, were then in the hands of the administrators, subject to distribution." This being the case, the Court thought that the administrators might in equity and good conscience, be permitted to show "a mistake in the settlement, subsequent liabilities, payments to the complainant after, or to his wife, before their marriage, &c." There can be no doubt, but what took place in the Orphans' Court, was nothing more than an ascertainment of the amount in the administrator's hands, belonging to the estate of their intestate, and that, that amount might be increased or diminished by evidence of a mistake, &c. But the case before us, is entirely unlike the one cited. Here, the first step preparatory to a settlement, is, the publication of an order, that the executors "will be required to settle, finally, their accounts with the estate of said deceased," &c. And on the day designated in the order, it appears, that "the Court proceeded to settle, finally, the estate of John Spencer, sen'r. deceased, with the executors," that the settlement was made, and that the decree in the record, is that settlement.

But it is objected, that the decree is not final, because it directs the sums adjudged to the several legatees, to be paid according to the terms and conditions of the will of the testator; and to be subject to such payments as may have been previously made, upon account of the respective legacies. The wife of the defendant in error, is made a beneficiary of the testator, by two clauses of his will. By the first, he bequeaths one thousand dollars to herself, her brother and sister, "to be equally divided between them, as they become of age, or marry:" by the last, he bequeaths to them one eighth part of the proceeds of his estate, not specially bequeathed, "to be equally divided between them." There is nothing to show that the defendant's wife was not entitled to receive both legacies at the time the decree was rendered. She may have been twenty-one years of age, if so, she was entitled to the first; and to the last, no condition is annexed. So that the reference to the will can have no influence in determining the character of the decree.

In declaring that the legacies shall "be subject to such payments as shall have been heretofore made," the Court have not evinced an intention that the decree shall be *interlocutory*. In

addition to the positive declaration, that the settlement is *final*, specific sums are determined to be due, and adjudged to be paid to the legatees. The decree then, is not an intermediate sentence, but is the conclusion of the matter, and contemplates no farther proceeding in order to its consummation. The Orphans' Court had fully exercised its jurisdiction, and could not allow any previous payments for the purpose of reducing the sums adjudged to the legatees, so long as the decree remained in force. The reservation to the executors, of the right to avail themselves of such payments, was most probably introduced upon a suggestion, that the legatees, or some of them, had received a part of their legacies, which the executors were unprepared to show. Be this as it may, the entire proceeding indicates, that no subsequent inquiry in the Orphans' Court was intended, with a view to reduce the sum ascertained by the decree to be due to any legatee.

Suppose a Court should render a judgment for a specific sum, in usual form, and at the conclusion add, that it was subject to such payments as were made pending the suit, or previously; such a judgment would doubtless be definitive, so far as it respected the action of the Court of law. Yet it would be competent for a Court of Equity to allow to the defendant all sums which he could show had been paid. So, in the case before us, the decree is a final disposition of the matter in the Orphans' Court, but chancery would entertain a bill, alleging, that payments had been made upon the legacies, previous to its rendition.

Lewis v. Smith, 2 Serg't. & R. Rep. 142, was an action on the case for money had and received, &c. against the defendant, as Marshal for the district of Pennsylvania, to recover the proceeds of the sale of certain goods taken in execution, and sold by the defendant, by virtue of, or under color of a *fi. fa.* issued from the Circuit Court of the United States at the suit of Escaralte against Fitzsimmons. Judgment was confessed by Fitzsimmons, with a stay of execution for sixty days. The judgment was entered on the docket, *generally*, without stating for what sum. Among other grounds of defence, it was insisted, that the judgment was merely *interlocutory*, and did not authorise the issuance of an execution. The Court held, that the judgment was *final*, "because sixty days stay of exe-

cution is given, which is never done on an interlocutory judgment." And great stress is laid upon what seems to have been the intention and understanding of the parties.

In the present case, the record is quite as strong to show, that the decree is final; for the order of publication asserts such a settlement to be intended; and the Court in rendering the decree, declares that it is final.

Having ascertained that the decree is final, we now proceed to inquire whether Louisa Spencer, previous to her marriage, was entitled to an execution thereon. By the act of 1830, "to extend the powers of the County and Orphans' Court in certain cases, and for other purposes," it is enacted,

1. "All decrees made by the Orphans' Court on final settlements, on the accounts of executors, administrators, and guardians, shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts against such executor, administrator, or guardian.

2. "When distribution of real or personal estate is decreed by the said Court, each distributee, heir, or devisee, may and shall have his or her writ of execution, or attachment, one or both, in the case of personal estate; and in the case of real estate, a writ of *habere facias possessionem*, against the executor, administrator, or guardian, and the sheriff to whom such writ shall be directed, shall execute the same according to the commands thereof."

This statute is exceedingly explicit. It declares the effect of decrees made on final settlements to be equivalent to judgments at law, and that each distributee, heir, or devisee, may have his, or her execution for the collection of the several distributive amounts. It seems too clear to require illustration, that Louisa Spencer was entitled to an execution on the decree, in her favor, since it is in all respects, such as the act contemplates.

2. It is not objected to the decree, that it was made by a Court having no jurisdiction of the subject matter; but it is insisted the jurisdiction was improperly exercised, in rendering several decrees against each of the executors. After ascertaining the amount of assets in the hands of the executors respectively, subject to distribution, the Court proceed to render

its decree against one of the executors in favor of some of the legatees, and against the other in favor of the remaining legatees. Without stopping to inquire whether this is irregular, or if so, whether the executors (who cannot be prejudiced) may avail themselves of it on error, we are satisfied that it does not make the decree *void*. If it be voidable, it should have been set aside by a direct proceeding, and cannot be collaterally impeached on a *scire facias* to revive.

But it is insisted, that as an action of account, or other appropriate action at law, is given to legatees for the recovery of their legacies, that remedy should have been adopted. Aik. Dig. 183. True, such a remedy is provided, yet it does not exclude any other which may be afforded by statute. The act of 1812, "concerning the distribution of intestates estates," as amended by the act of January, 1833, authorises a distributee or legatee, at any time after the expiration of eighteen months from the grant of letters of administration, &c. to petition the Orphans' Court for an assignment of his distributive share or legacy, and the County Court is authorised to take measures to cause the same to be done. Aik. Dig. 155; *Leavens v. Butler and Wife*, 8 Porter's Rep. 392. This statute taken in connection with that of 1830, already cited, clearly shows, that the Orphans' Court, on a final settlement of the accounts of an executor or administrator, may dispose, by its decree, of all the assets in hand, and award to each distributee or legatee, his proper portion.

There are doubtless questions, which sometimes arise in the execution of the will, that the Orphans' Court is incompetent to determine, and where these relate to trusts technically so called, a Court of Equity must be resorted to, for relief. But what we have said in regard to the form of the bequests, and the powers of the Orphans' Court, will sufficiently show, that the present case is one in which it can administer complete redress.

In *Blackwell's ex'rs v. Meneese*, 5 Stewart and Porter's Rep. 400, the Court said, there was no law prior to 1832, which authorised the Orphans' Court, upon the final settlement of an estate, to insert in its decree, the amount of each distributive share or legacy; prior to that year, by the act of 1830, all decrees, upon final settlements, were to have the force and effect of judgments, and executions allowed to issue thereon for the col-

lection of the distributive amounts, yet not even a distributive share of the balance found in the hands of the executors, could have been adjudged, much less a legacy given by the will. If it were necessary to a decision of this case, we should be inclined to think that the act of 1830, effected what the Court attributed to the act of 1832, and that the latter statute was thus far supererogatory. But supposing that the case cited upon the point we are considering, contains a just exposition of the law, the decree at most, would be reversible, but not absolutely void, so as not to authorise the issuance of an execution.

3. It is conceded, that at common law, a *scire facias* did not lie to revive a judgment in a personal action where a year and a day had elapsed after the rendition of the judgment, and before the issuance of an execution. Such at least seems to be the weight of authority. But the statute of Westm. 2d Edw. 1, chap. 45, gives a *scire facias* in such a case. This rule of the common law, it is said, was for the protection of the debtor, and was founded on the presumption, that the judgment was released or satisfied, after the lapse of such a period, without an execution having issued. Pennock and another v. Hart and another, 8 Serg't & R. Rep. 376; 6 Dane's Ab. 464; 2 Reeves Eng. Law, 189; 6 Bac. Ab. 104.

Though a *scire facias* was not the appropriate remedy previous to the passage of the statute cited, to revive a judgment in a personal action, where no execution had issued for a year and a day, yet it does not follow, that it would lie in no case upon a judgment in such an action. The reason of the rule leads to a different conclusion. It is a writ that issues in many cases, and is not at all confined to any particular branch of the law, but is in use in many parts of judicial proceedings. 6 Dane's Ab. 462. It is deemed a judicial writ, and founded on some matter of record, as judgments, &c. to enforce the execution of them, or to vacate or set them aside. But in many cases, a *scire facias* is granted, partly upon the record, and partly upon a suggestion, without which no proceeding could be had on the record; 6 Bacon's Ab. 102. Thus, if a *feme sole* obtain judgment, and marry, her husband and self may sue out a *scire facias*, calling upon the defendant, to show cause, why they should not have execution. 6 Dane's Ab. 467-8; 6 Bacon's Ab. 116.

By a statute of this State, the plaintiff is entitled to his *scire facias* on *any* judgment where no execution has been issued for a year and a day; Aik. Dig. 621, 2d ed. This act was passed, professedly with a view to remove all doubts on the subject, and it may well be questioned, whether it introduced a new rule; for it had been the practice for a long time previously, to revive judgments, which had abated, or become otherwise inoperative, by *scire facias*. And even if were clear that such was not the proper mode at common law, by which a husband was to obtain execution of a judgment recovered by his wife, while *sole*, we should hold, that in this respect, the common law rule was changed, by the long continued use of the *scire facias* in such a case. The more especially as no rights would be thereby affected. And this being the remedy for the revival of a judgment, there can be no question, but it is applicable to the decree of an Orphans' Court which we have seen, is declared by statute to have the force and effect of a judgment.

4. The plaintiff's counsel is mistaken in supposing, that it appears from the record, the first writ of *scire facias*, was returned by the sheriff, on the day it was received, and some eight or ten days previous to the time it was returnable. The indorsement of the sheriff shows the day of its receipt, but the return is not dated; and we must therefore intend it to be regular.

If essential to the regularity of the proceedings, that the second *scire facias* should be an *alias writ*, we think the words, "*alias sci fa*," written at the head of the process, taken in connection with the order of Court, that preceded it, sufficiently show that such was its character. Besides, the objection goes to a defect of form, which was amendable on motion, and does not warrant a reversal of the decree. Aik. Dig. 265-6.

5. The order or decree, rendered on the *scire facias*, is unobjectionable. The usual requisition made by the *scire facias* upon the defendant, is to *show cause*, why the plaintiff should not have execution of the judgment; in the present case, the defendant is required to *show cause* why the decree should not be revived, &c., and the plaintiffs have execution thereon. The gist of the matter is, execution upon the decree; this being accorded by the Court, the decree was *ipso facto*, revived in due form.

Other objections were taken by the plaintiffs counsel, to the decree, and previous proceedings of the Orphans' Court, but as they do not regularly present themselves in the case before us: we decline considering them. It remains but to add, that the order of the Orphans' Court, is affirmed.

GAYLE & SAFFOLD V. BENSON.

1. The assignment of a judgment, is a transfer of the money to be collected on it, and when collected by the attorney of the original plaintiff, who has had notice of the assignment, is held for the use of the assignee.
2. The action of *assumpsit* may be maintained by the assignee, for the recovery of the money, against the attorney, after notice of the assignment, and demand of the proceeds of the judgment.

Error to the Circuit Court of Dallas.

THIS was an action of *assumpsit*, brought by the defendant in error, against the plaintiffs in error, as partners. The declaration contains the common money counts, and upon issue joined on the pleas of *non assumpsit* and payment, the plaintiff obtained a verdict and judgment.

The evidence offered on the trial of the cause, as appears by a bill of exceptions, was that a judgment had been previously obtained, by one Burke, for the use of one Roberts, against John McLaughlin, adm'r, for seventy-nine dollars six cents; that the execution was returned satisfied, by the sheriff, and the money paid over to the defendants, who were the attorneys of record. The plaintiff also offered in evidence a written assignment of the judgment from Roberts, and a demand of the money, before the commencement of this action. To the introduction of the assignment, the defendants objected, but the Court overruled the objection. One of the defendants was a witness to the assignment. The defendants proved they had

paid over the money to Roberts; and evidence was also offered conducing to prove a dissolution of the law partnership of the defendants. The bill of exceptions contains other testimony not necessary to be noticed, upon which the Court charged the jury:

1. That the defendants were liable, as charged in the declaration, for the said sum of money, if it was received while they were partners, and that a dissolution of the partnership before the commencement of this suit, did not bar the present action.

2. That as to all persons dealing with the firm, the defendants were bound to give actual notice of the dissolution, and to all persons not dealing with the firm, they were bound to give public notice in the Gazette.

3. That if they believed one of the defendants had notice of the assignment of the judgment after the dissolution of the firm, and not the other, they might find against him alone.

The defendants moved the Court to charge the jury, that if the transfer of the judgment was made, after the dissolution of the firm of Gayle & Saffold, the firm was not liable; upon which the Court charged the jury, that they might find a verdict against the member of the firm who had received notice. To which the defendants excepted, and now assign for error, the charges given, and the refusal to charge, as set out in the bill of exceptions.

PECK, for the plaintiff in error, made two points: First, that the assignee of the judgment, under the facts of this case, cannot maintain an action in his own name, and cited Metcalf & Perkins Dig. 297.

Second. That the Court erred, in instructing the jury that they might find against one or both of the defendants. Aik. Dig. 268.

J. B. CLARKE, contra.

ORMOND, J.—The principal question presented in this case, is whether the defendant in error, who is the assignee of a judgment, can maintain an action against the attornies at law of the plaintiff in the judgment after notice of the assignment and receipt of the money. The assignment of the judg-

ment was a transfer of the money to be collected on it; it was an absolute and unconditional appropriation of it to the assignee. The money, when collected by the attorney, was the property of the assignee, and held for his use, and we can perceive no reason why he should not be allowed to maintain this action to recover it after demand made, notice of the assignment of the judgment, having previously been given,

The counsel for the plaintiff in error, has relied on a case cited from 5 J. J. Marshall, 651; only a brief abstract of which from Metcalf & Perkins Dig. has been brought to our notice. The principle said to be decided is, that an assignee of a judgment, cannot maintain an action against an *officer*, who, after notice pays it over to the assignor, the judgment creditor. We have not been favored with the reasoning of the Court, but presume the decision turned on the fact, that the mandate of the writ required the sheriff to bring the money into Court, and that being in the custody of the law, it could not be intercepted. Without affirming or denying the correctness of this decision, it is sufficient to say, that this case is totally unlike it; an attorney at law, is the agent of the party, and the principal may appropriate money in his hands to the use of another, after notice of which, if he pays it to the principal like any other agent, he will be responsible to the person to whom the fund really belongs, in an action for money had and received, founded on the implied promise. That the case of an attorney at law, does not constitute an exception to the general rule, see the case of Taylor v. Bates, 5 Cowen, 376.

As the jury, by finding against both defendants, have affirmed that the money was received, and notice given by the plaintiff, while the partnership existed, it is not necessary to enquire into the correctness of the charge, that they might find against one of the defendants, if the money was received after the dissolution of the firm, as the charge, if wrong in point of law, could not by possibility prejudice the defendants.

Let the judgment be affirmed.

PHARR & BECK v. BACHELOR.

1. The first count set out a parol contract and breach, and concluded as in *case*; the second count was in *assumpsit*; *Held*, on demurrer for a mis-joinder of counts, that the conclusion of the first count might be rejected as surplusage.
2. Where a party offers no evidence upon a trial before the jury, as a matter of right he may demur to the evidence of his adversary; especially if it is not "loose, indefinite and circumstantial."
3. A demurrer to evidence is sufficient, if after setting out the evidence, it admit every word, figure and statement, and "every conclusion that may be reasonably drawn therefrom to be true," and refers in usual form the questions of law to the court; unless from the peculiarity of the case a demurrer in such form is not adapted to it.
4. In an action upon a verbal contract, *time*, in general, forms no material part of the issue; therefore one time may be assigned to a given fact and another proved. But to tolerate this latitude in pleading, *time* should be laid under a *videlicet*, and should not be intrinsically impossible, or inconsistent with the fact to which it relates.
5. A charge of a Judge which refers to the jury, the decision of a question of law, is erroneous.
6. In pleading, the legal effect and identity of the contract should be stated, and any variance in this respect, relating to the promise or undertaking, upon which the action is founded, or the consideration thereof, will be fatal.
7. Impertinent matter, foreign to the cause, need not be proved; but *Semble*, an immaterial averment must be proved, where the subject of it is, a record, a written instrument, or perhaps an express contract, otherwise, there might be a variance between the pleading and the proof.
8. A contract cannot be rescinded *in toto*, by one of the parties, where both parties cannot be placed *in statu quo*; but a contract will be considered as rescinded, where the party who is to perform an act, has made his performance impracticable, or where he is prevented from doing the act by the other party.
9. Where the declaration alleges, that the plaintiff was prevented from performing his part of the agreement, either by the refusal of the defendant to permit him, or by some act or omission on his part, such an allegation is not sustained by proof, that the contract was rescinded by mutual consent, and the defendant agreed to pay the plaintiff for his services, &c.; but the modified contract should be declared on.
10. A party who has paid money, or delivered goods, upon a contract that is rescinded, may recover the money in action, for money had and received, may maintain *trover* for his goods, or waive the tort, and bring an action for goods sold and delivered.
11. The mere fact, that certain persons valued property, the subject of the contract, will not make their *written* valuation, evidence, unless it was authorised to be made, or assented to, by the parties.
12. An affidavit of the non-residence, &c. of a witness was made five months before a commission issued to take his deposition: *Held*, that his continued non-residence would be presumed, and the affidavit was sufficient.

Writ of error to the Circuit Court of Talladega.

THE defendant in error brought an action of *assumpsit* against the plaintiffs, and set forth his cause of action in two distinct counts. In the first count, he alleges circumstantially a parol contract entered into between the defendants and himself, by which he undertook, on the 19th July, 1837, to keep a boarding house for them at the Sulphur Springs, in the county of Talladega; and also, to sell them furniture, wines, &c.; in consideration of which, they agreed to pay the sum of three thousand five hundred dollars, and the value of his furniture, wines, &c. to be ascertained by two disinterested men, to be selected, &c. It is further alleged, that the plaintiff, in compliance with his contract, entered upon the service stipulated, and that he delivered furniture, wines, &c. to the defendants, until they refused to receive more. The plaintiff further avers a readiness, willingness, and actual performance of his undertaking and agreement, so far as the defendants would allow; a non-performance by the defendants, and an order from them to him to leave their service, &c. The first count concludes with the allegation that the defendants "wilfully, fraudulently and tortiously failed," &c.

The second count is for goods, &c. sold, for work and labor done, for money lent, &c. for money paid, &c. for money had and received, &c. and an account stated.

A general demurrer was filed to the declaration, which being overruled, the defendants pleaded, 1. *Non assumpsit*. 2. Set off. 3. Payment. 4. Failure of consideration; and 5. A failure by the plaintiff to perform his part of the contract.— On each of these pleas, there was an issue of fact; and thereupon the cause was submitted to the jury.

The defendants demurred to the evidence, which is drawn out at length, and accompanies the demurrer. The demurrer is as follows: "The said defendants come and say, that admitting every word, figure and statement in the above annexed *memorandum*, of the testimony in this case, to be facts, and to be true, and admitting every conclusion that may be reasonably drawn therefrom, to be true," &c. and concludes by referring in usual form, the questions of law to the Court. The Court admitted that the testimony annexed to the demurrer, was correctly set forth, yet as the parties had not agreed upon a statement of facts, and as the plaintiff had refused to join in

demurrer, the Court would not compel him to do so; and further, that the demurrer was only an admission of the truth of what the witnesses swore, and not an admission of the truth of the facts, which the evidence, both positive and circumstantial, tended to prove." To the decision of the Court, the defendants excepted, &c.

The cause was then argued to the jury, and the Court, among other things, charged them, that it was not necessary to show, that the contract alleged in the first count, was made on the 17th July, 1837. "If a recovery by the plaintiff on the first count in his declaration, would be a bar to a second suit for the same cause, then the special contract on which that count is founded, is substantially proved." That the plaintiff need not show that the times of payment for the furniture, wines, &c. were those alleged. But the contract must be proved substantially as stated, yet it was not necessary to adduce proof touching a stipulation of the agreement, of which no breach was alleged.

Further: That the contract could only be cancelled by the assent of both parties, and that a re-delivery of the furniture, &c. was necessary to the cancellation of the contract; but if it was cancelled as to the furniture, &c. and the defendants retain it, the jury should take it into the account, and find its value.

The Court refused to charge, that if the contract was cancelled before suit brought, and defendants had agreed to pay the plaintiff for his services, furniture, &c. there could be no recovery on the breach, as alleged in the first count—and that under the evidence before them, the plaintiff was not entitled to a verdict on the second count.

Many other charges were given and refused, which as they are not stated in the opinion of the Court, it is unnecessary here to notice. The evidence set out in the record shows, that none of the points noticed, as having been decided by the Court, were impertinent or abstract.

A second bill of exceptions was sealed at the time, from which it appears that one Burton, as the agent of the defendants, appointed persons at Wetumpka, to value the furniture, wines, &c. and that the persons so appointed, made a schedule and valuation in writing; that the property, or a portion of it,

was sent to the defendants at the Springs, and the defendants afterwards, ratified his acts, and thanked him for his services. The plaintiff's counsel then asked Burton the value of the property sent; to which question the defendants objected. 1. Because the persons valuing the property, were the best witnesses. 2. Because the written valuation made by those persons should be produced, or its absence accounted for; which objection was overruled by the Court.

The plaintiff then proposed to read the deposition of F. A. Manard, whose evidence was material for him; the defendants objected, on the ground that the affidavit of the materiality and non-residence of the witness, was made on the 3d of October, 1838, and the commission to take take his deposition, was dated on the 12th March; 1839. But the objection was overruled, and the deposition suffered to be read to the jury. A verdict and judgment was thereupon rendered for the plaintiff.

WM. P. CHILTON, for the plaintiff in error, made the following points among others, viz.:

1. The demurrer to the declaration should have been sustained, and the plaintiff below must recover on the first count, or not at all. 1 Stew't. Rep. 12; 1 Porter's Rep. 116; 4 Porter's Rep. 502; 9 Porter's Rep. 337.

2. The plaintiff should have been compelled to join in the demurrer to evidence. 4 Porter's Rep. 405.

3. The Circuit Court should have instructed the jury that the plaintiff must prove the contract as stated, and it was irregular for that Court to assume facts as proved, and to refer to the decision of the jury, questions of law. 2 Stew't. 255; Aik. Dig. 283, sec. 134.

4. It was competent for the parties to have rescinded the contract, and substituted another in its stead; the re-delivery of the furniture was not indispensable to its abrogation.

5. The substituted contract should have been declared on, and the instruction to the jury, that the plaintiff might recover for the furniture not re-delivered, though the contract was rescinded, was erroneous. If the contract was rescinded by mutual consent, and nothing was said as to the furniture, &c. they re-vested in the plaintiff, and he might recover them in the appropriate action, if the defendants had no lien on them.

6. The evidence of the persons who valued the furniture, was the best, and none other should have been received until the absence of their written valuation was sufficiently accounted for.

7. The deposition of Manard was not admissible; the affidavit shows that he was a non-resident when it was made, but not when the commission issued.

PRYOR, for the defendant, among other things, insisted,

1. There is no misjoinder of counts in the declaration; both are in *assumpsit*, and if either is good, the demurrer should have been overruled—that the second is good, has not been questioned. The conclusion of the first count does not show that it is in case. *Howe v. Cook*, 21 Wend. Rep. 29.

2. The Circuit Court properly refused to compel the plaintiff to join in the demurrer to evidence. It did not sufficiently admit the truth of the facts, and the conclusions therefrom.—7 Porter's Rep. 423; 1 Dall. Rep. 20; 4 Cranch's Rep. 219; 7 Cranch's Rep. 565; 11 Wheat. Rep. 320; *ibid.* 171; 2 Serg't & Rawle Rep. 185; 3 Pet. Rep. 36; 22 Pick. Rep. 135; 2 H. Bla. Rep. 205; Gould's Plead. ch. 9, sec. 47 to 74; Aik. Dig. 277, sec. 107.

3. It was not necessary for the plaintiff to show, that the contract stated in the first count, was made on the day alleged. Doe dem. *Lowrie v. Dyeball*, 8 B. and C. Rep. 70.

4. The plaintiff was entitled to recover on the second count, and the finding of the jury will, if necessary, be referred to that count; but such reference will not be necessary, for the first count was proved according to its legal effect. 2. Porter's Rep. 542; 9 Porter's Rep. 122.

5. Upon the rescission of a contract, a party who has delivered property under it, may recover its value under the appropriate common counts in *assumpsit*. 11 Wend. Rep. 237; 10 Johns. Rep. 36; 4 Wend. Rep. 285; 7 Johns. Rep. 132; *McMillan v. Wallace*, 3 Stew't. Rep. 185; *Hunnewell v. Turner*, 4 Stew't. & P. Rep. 262; *Blair v. Asberry*, 4 Porter's Rep. 435; *Martin v. Chapman*, 6 Porter's Rep. 344; *Gazzam v. Kirby*, 8 Porter's Rep. 253. Or he may recover on the special count, provided, that so much of that count as is proved, and shows his right to recover, is not necessarily connected

with the other parts of the contract, so that it cannot be severed. 8 B. & C. Rep. 70.

6. The Court should, if practicable, so interpret the instructions to the jury, as to make them sensible and pertinent. Rowland v. Ladiga, 9 Porter's Rep. 488.

7. The instructions to the jury, that they should disregard the common count, was incorrect, and cannot prejudice the plaintiff; it may sustain the verdict.

8. The evidence offered as to the value of the furniture and wines, was admissible; the written valuation could not have been used; at any rate, it would not exclude other evidence. So, the deposition of Manard was properly received; a written oath was not necessary to have authorised the commission to issue, but if it was, the one produced was entirely sufficient. Boardman v. Ewing, 3 Stew't. & P. Rep. 293.

COLLIER, C. J.—It is objected to the declaration, that the first count is in case, and the second in *assumpsit*; and it is therefore insisted, that the demurrer should have been sustained for a misjoinder. The first count, after setting out a parol contract and breach, concludes as a declaration in case; and the conclusion, it is insisted, must determine its character. This argument cannot be maintained. If the conclusion of the count was stricken out, it would be good in *assumpsit*; and it may therefore be rejected as surplusage. No other objection is made to the first count, nor indeed can, on general demurrer, as the second count, is confessedly good.

It has been repeatedly adjudged, that a party who introduces no evidence upon a trial before the jury, as a matter of right, may demur to the evidence of his adversary; the more especially if the evidence demurred to, is not "loose, indefinite or circumstantial." Such was the decision of this Court in Alexander v. Fitzpatrick, 4 Porter's Rep. 405. A demurrer to the evidence admits the truth of the facts proved, together with the conclusions fairly inferrible therefrom, and asks the judgment of the Court as to their *legal effect*. As it is the office of the jury to ascertain the facts, and determine what is proved, if these are admitted upon the record, the cause may be withdrawn from them, and the question of law arising upon

the admission, decided by the Court. Such is the purpose and effect of a demurrer to the evidence.

The law, as we have stated it, is not denied by the defendant in error, but it is insisted that the demurrer tendered, does not distinctly admit on the record, the truth of all the facts offered in evidence, and of every conclusion which the facts conduce to prove. The demurrer explicitly admits "every word, figure and statement," of the evidence which is set out *in extenso*, "to be true,"—it also admits "every conclusion that may be reasonably drawn therefrom, to be true," and refers in usual form, the legal questions to the Court. This is certainly sufficient, unless there be something in the case to show, that the demurrer is not adapted to it. The Circuit Judge states upon the record, that the demurrer truly set forth all the material evidence in the cause, but that the Court refused to compel a joinder, because the demurrer itself was deemed insufficient.

In *Copeland v. New Eng. Ins. Co.* 22 Pick. Rep. 135, the Court considered that where the evidence consists of written documents, or of direct positive testimony of witnesses, it may be demurred to, by stating it as it was submitted to the jury, and admitting its truth, as well as the conclusions fairly inferrible from it. "But where the evidence is circumstantial or uncertain, leaving much to inference and presumption," the Court say, "it is not easy or safe to frame a demurrer upon it, or a rejoinder thereto. It will not be sufficient to demur to the evidence generally, and leave to the Court to ascertain what it tends to prove, or what inferences may be drawn from it. But in reciting the evidence in the demurrer, the party demurring must state distinctly the facts which the evidence tends to prove, and which he thereby admits, that the Court may readily perceive the facts upon which they are to decide." Conceding that the law is correctly laid down in the case cited, and still the demurrer is sufficient. The evidence is direct and positive, and it is quite enough, after reciting it, to admit its truth as well as the conclusion deducible from it, without undertaking to particularize the facts and conclusions which are admitted.

We will not stop to inquire, whether the demurrer to the evidence should have been sustained, or whether its rejection, if it were not sustainable, would authorise a reversal of the judgment. *Alexander v. Fitzpatrick*, 4 Porter's Rep. 409.—

Other and more important questions, which arise in the cause, are decisive of its fate here.

In an action upon a verbal contract, *time* is considered in general as forming no material part of the issue; it is therefore allowable for the pleader to assign one time to a given fact, and prove another. But to tolerate this discrepancy between the allegation and the proof, he should lay the time under a *videlicet*, and take care that he do not lay a time that is intrinsically impossible, or inconsistent with the fact to which it relates. Step. on Plead. 292; 2 Phil. Ev. C. & H. ed. 533. In the present case, the declaration states the time when the contract was made thus, "heretofore, to wit: on the 19th day of July," &c. According to the law, as we have cited it, from very eminent elementary writers, this mode of pleading does not oblige the pleader to show, that the contract was made on the day alleged.

The Circuit Court, in the instructions to the jury, employs this language: "that if a recovery by the plaintiff on the first count in his declaration, would be a bar to a second suit on the same cause, the special contract mentioned in said first count, is substantially proved." The conclusion of this charge is clearly a *nonsequitur* from the premises laid down—it deduces a conclusion of fact from a question of law, and while the Court decides the fact hypothetically, it refers the law to the decision of the jury. To be more precise, the jury are directed to inquire, whether a recovery upon the first count would bar another action for the cause embraced by it, and if it would, the Court says the special contract, "is substantially proved." This instruction cannot be sustained, for it is erroneous in itself, as well as for the additional reason; that it makes the jury judges of law. We should have been inclined to think it probable, that the bill of exceptions was not correctly transcribed into the record, if a bill, in all respects similar to that accompanying the writ of error, had not been sent up in answer to a *certiorari*.

In pleading, the legal effect and identity of the contract should be stated, and any variance in this respect, relating to the promise or undertaking upon which the action is predicated, or the consideration thereof, will be fatal; but where a party agrees to do several things, though the declaration describe

the contract at length, yet if it allege a breach, applying only to some one of the stipulations, the plaintiff's proof should be confined to the breach stated. Where a declaration contains impertinent matter, foreign to the cause, it need not be proved; but the same remark is not universally true of immaterial averments. "An immaterial averment is one, alleging with needless particularity or unnecessary circumstances, what is material and necessary, and which might properly have been stated more generally, and without such circumstances or particulars; or in other words, it is a statement of unnecessary particulars in connection with, and as descriptive of what is material." Gould's Plead. 160, *et post.* "The rule, as limited by the more modern authorities," says Judge Gould, appears to be, that no immaterial averment requires precise proof, unless the failure of such proof would occasion a variance between the pleading and the proof: or (in different language) strict proof of such averment is not at this day necessary, unless the subject of the averment is a record—a written instrument, or as I conceive, an express contract. Inasmuch as these are in strictness, the only subjects of variance, (properly so called) when the mistake in the pleading is in a point *not in itself material*. Gould's Plead. 164.

It is certainly a correct principle, that a contract cannot be rescinded *in toto*, by one of the parties, where both of them cannot be placed in the identical situation which they occupied, and cannot stand upon the same terms as those which existed, when the contract was made. But all executory contracts may be rescinded by the parties to them, if their interest continues until the agreement to rescind is made. And a contract will be considered as rescinded, when the party who is to perform an act, has made his performance impracticable, or where he is prevented from doing the act by the other party. Chitty on Con. 573 and cases cited, 4 A. ed. Johnson v. Reed; 9 Mass. Rep. 78; see also 1 Johns. Cases, 116; 16 Mass. Rep. 161.

It has been held, that an agreement rescinded in part, is rescinded *in toto*; and that upon a rescission, the parties are remitted to the rights to which they were entitled before the agreement was entered into. Conner v. Henderson, 15 Mass. Rep. 319; Raymond v. Beasnard, 12 Johns. Rep. 274; Griffith v. Fred. County Bank, 6 G. & Johns. Rep. 424. These decisions, however, must be understood, as declaring the law in

those cases only, where the contract is rescinded absolutely, and not *sub modo*, for it is entirely competent for the parties to rescind on terms, or under a modified contract.

In the case at bar, the declaration requires the plaintiff to show, that he was prevented from performing his part of the agreement by the refusal of the defendants to permit him, or by a failure to perform theirs. If there was a voluntary rescission of the contract by the mutual assent of the parties, and an agreement to pay the plaintiff for his services, his furniture, wines, &c., and to compensate him for any loss he sustained by its dissolution, then the plaintiff should declare upon this latter agreement—he could not give it in evidence under his declaration, for it would not harmonize with its allegations. Whether the proof in the record shows such to have been the case, we will not undertake to say; we merely state the law, to show that the Court, in its charge on this point, misapprehended it.

If one party, who has paid money, or delivered goods upon a contract, which the other refuses to perform, elects in a proper case to rescind it, he may recover back his money in an action for money had and received, or his goods in detinue, or after a demand and refusal to deliver them, he may maintain an action of *Trover*, or he may waive the tort and treat the defendant as a purchaser, and recover for goods sold, &c. *Chauncey, et al. v. Yeaton*, 1 N. Hamp. Rep. 151; *Hill v. Davis*, 3 ib. 384; *Gilmore v. Wilbur*, 12 Pick. Rep. 120; *Pierce v. Drake*, 15 Johns. Rep. 475; *M. & Mech. Bank v. Gore*, 15 Mass. Rep. 79; *Willson v. Foree*, 6 Johns. Rep. 110; *Butler v. Haight*, 8 Wend. Rep. 535; *Norton v. Young*, 3 Greenl. Rep. 30. See also *Pope v. Nance*, 1 Stew. Rep. 354; 4 Mass. Rep. 505.

It was also argued, that the best and only evidence (if it be attainable) of the value of the furniture, &c., is the written estimate of those who were appointed to value it. This objection is founded upon the supposition, that the evidence offered was not the best of which the fact is susceptible. True, where there is written evidence, which is itself admissible, it must in general be adduced, or its absence accounted for, in order to let in proof of an inferior grade; but the rule requiring the best evidence, does not operate to exclude proof, because it is not all, or the most satisfactory which might be adduced, where the evidence offered, and that which is withheld, is all of the same

general quality : but in such case, it in general, goes no farther than to forbid that evidence, which is in its nature, merely circumstantial, shall be received, when direct and conclusive evidence may be had. In the case before us, the written valuation would not be legal evidence ; it had not been made by the direction of the parties ; it does not appear that it had been assented to by them, or communicated to them, and if there is such a paper, it can only be regarded as a mere *memoranda* of the persons valuing the property, to aid their memory, or to be handed to the parties to indicate what had been done, and to enable them to settle.

But if it was a part of the agreement between the parties, that the value of the furniture, &c., was to be ascertained by persons to be designated, and persons in obedience to the contract, were appointed for that purpose, then their evidence of the value (if it could be had,) should have been required before other proof of value was received. But if such valuation was not required by the contract, or was not assented to by the parties, as fixing the sum which the plaintiff in error was to pay, it would be of no higher grade, than evidence founded on the judgment or opinion of other witnesses ; and consequently, would not exclude all other parol proof.

It is provided by the 11th section of the act of 1807, "concerning witnesses," that a commission shall issue to take the testimony of a witness in any cause pending in a Court of this State, upon oath being made, that such witness resides out of the State. It is argued for the plaintiffs in error, that the issuance of the commission must immediately follow the oath, and that five months, the period which elapsed before the commission issued, was too long. If the commission issued upon a suggestion, that the witness was about to leave the State, or was incapable of attending Court, by reason of bodily infirmity, or other cause, then the argument would be entitled to great consideration. In such case, we incline to think that it should be shown that the witness was still absent from the State, or incapable of attending Court. But where a deposition is taken upon an oath being made, that the witness resides out of the State, his non-residence will (when the deposition is offered as evidence,) be presumed at any distance of time. It would then seem, upon principle, that an affidavit that a witness resides

out of the State made after suit brought, will authorise a commission to issue any time before trial, to take his testimony; in the absence of proof to the contrary, his continued non-residence will be presumed.

The record presents many other points than those noticed, but the principles decided, it is believed cover them all, and will lead to a decision of the cause on its merits. The cause comes up in an exceedingly confused state. The bill of exceptions, which is almost unintelligible, presents the same question in several different forms; and charges, founded upon the same principle are several times asked and refused, and others perhaps several times given.

We have stated several errors in the proceedings of the Circuit Court, for which the judgment should be reversed. There are perhaps others which may be discovered by a comparison of this opinion with the points raised, but which we shall not stop to particularize.

The judgment is reversed, and the cause remanded.

SMITH v. DENNIS.

1. When the sheriff takes insufficient bail, and on motion of the plaintiff he is substituted for the bail so taken by him, the bail is entitled, on motion, to have an *exoneretur* entered on the bail piece.

Error to the Circuit Court of Barbour.

THE Court below, on motion, discharged the bail which had been taken in a suit of the plaintiff in error v. one McMahan, supposing that the bail was discharged by the act of 1839, abolishing imprisonment for debt. From which judgment the plaintiff prosecutes this writ of error.

J. GILL SHORTER, attorney for plaintiff in error.

BURFORD, contra.

ORMOND, J.—In discharging the bail for the cause assigned, the Court no doubt erred, as was determined by this Court, in the case of *Kennedy v. Rice*, 1 Ala. Rep. N. S. 11; it is, however, insisted by the counsel for the defendant in error, that conceding it to be erroneous, the plaintiff in error cannot be heard, to controvert it, as he has no interest in the matter.

It appears from the record, that at the return term, the plaintiff gave notice to the sheriff of the insufficiency of the bail taken by him, and that a motion would be made to the Court to substitute him as bail. Upon the hearing of this motion, the Court declared the bail bond taken by the sheriff, insufficient, and that the sheriff be taken and held as special bail.

The effect of this judgment is a substitution of the sheriff for the bail taken by him. The language of the act is, "that the sheriff shall be deemed and stand as special bail, and the plaintiff may proceed to judgment against such sheriff or other officer, as in other cases, against special bail."

The substitution of the sheriff as bail, for the bail returned by him, must have the effect, so far as the principal is concerned, of discharging the bail. Where bail are excepted to, and do not justify, they are discharged, nor will the plaintiff be allowed to waive the exception after the expiration of the time within which the bail may justify. *Thorpe v. Faulkner*, 2 Cowen, 514. See, also, 1 Cowen, 54, 56; 4 Johns. 185; 4 Burrows, 2107. Without going the length of this authority, it is sufficient to say, that as the bail was held insufficient, and the sheriff substituted therefor, the bail is entitled to have an *exoneretur* entered on the bail piece, and the judgment must therefore be affirmed.

SCOTT v. MACY, et als.

1. Where an attachment is sued out as auxilliary to a suit commenced in the ordinary mode, a mistake in the writ of attachment, of the time when the Court is held, in which the original suit is pending, is *amendable*.
2. An attachment will not be quashed on account of a defective bond, unless the plaintiff is unwilling to execute a good bond.

Error to the County Court of Sumter county.

THIS action was commenced in the Court below, by the plaintiff in error, against the defendants, by writ of *capias ad respondendum*. As auxilliary to this process, the plaintiff on affidavit, obtained also a writ of attachment. The bond executed by him for the attachment, does not disclose the term to which the writ of attachment is returnable, and the attachment is made returnable to the first¹ instead of the second Monday in July. The plaintiff moved to amend his bond and attachment, which the Court refused, but on motion of the defendants, quashed the attachment.

INGE & SMITH, for the plaintiffs in error, cited 1 Ala. Rep. N. S. 580; 9th Porter, 320; 7th Porter, 486.

No Counsel appeared for defendant.

ORMOND, J.—This attachment was issued, as auxilliary to a writ, which had been sued out for the recovery of the same debt, and which the law under which it issued, required “should be filed with the papers in the original cause, and constitute a part thereof.” In such a case, the writ of attachment is not the leading process in the suit, the parties being in Court by the writ which had previously issued. No possible injury could result from the mistake of the time when the Court was held, in which the suit was pending. However, therefore, the law might be, if the suit had been commenced by original attachment, in a case like the present, the error was a mere clerical *misprision*, and as such, amendable under the influence of the statute which authorizes amendments of defects of form in attachments. Aik. Dig. 42.

It is the settled law of this Court, that an attachment will not be quashed on account of a defective bond, unless the plaintiff is unwilling to execute a good bond, as is shewn by the cases cited by the plaintiff in error. There being, therefore, no sufficient reason for quashing this attachment, the judgment of the Court below is reversed, and the cause remanded for further proceedings.

SPENCE V. DUREN, *et als.*

1. A vendee of land in possession, may have relief in Chancery, when the vendor has made a fraudulent representation as to the title.
2. But the assertion of the vendor, that his title was good, is not fraudulent, unless he *knew* that a better title existed in another.
3. The facts, as to which a discovery is sought, and the action of the Court demanded, must be stated with reasonable certainty and precision, and the allegations be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer them.

Error to the Chancery Court sitting at Talladega.

THIS was a bill in chancery, filed by the plaintiff in error against the defendants in error.

The complainant, by his bill, alleges that he made a contract with Duren and Copeland, two of the defendants, for the purchase of a half section of land, at the price of five thousand dollars, of which sum, one half was paid down, and executed his notes for the residue, in two equal annual payments; and on the 13th March, 1835, Duren and Copeland executed their bond to make title to the land, on the maturity of the notes.— He further alleges that they represented they had title to the lands, and that the patent would issue to them, but that since the sale, he has been informed, and believes that the vendors were not the sole owners of the land, but that two other persons who are made defendants, are also interested, but in what manner, or to what extent, he is not able to say, and charges that his vendors overreached him by selling land as their own, in which

others had an interest. The bill further charges, that judgments have been obtained on the notes executed by him: that Duren, one of the vendors, has left the country.

The prayer of the bill is, for a specific execution of the contract, and that if the other defendants have an interest in the land, that they be compelled to disclose it, &c.

An injunction to the judgments at law having been granted by one of the Circuit Judges, the Chancellor dismissed the bill for want of equity, from which decree this writ of error is prosecuted.

STONE, for plaintiff in error.

J. L. MARTIN, contra.

ORMOND, J.—The principal question presented by this bill, was much considered by us at the last term of this Court, in the case of *Young v. Harris*, adm'r. We then held that, "where one was induced to purchase land by the fraudulent representations of the vendor, in relation to the title, the falsehood of which, he had no means of ascertaining by the exercise of ordinary diligence, he may have relief in chancery before eviction, and without abandonment of possession." The only charge in the bill in this case, which could be supposed to impute fraud to the vendors, is, to the following effect:

"That at the time of the purchase, orator was induced to believe that the defendants, Duren and Copeland, had a regular title to said lands in an incipient stage, and be abundantly able to make him such title for the same, as they covenanted in their bond to make, by the maturity of the notes, for the purchase money; that they so represented the matter to him, and upon their representation, he was induced to make the purchase, and from the fact, that they alone made the sale to him, and executed alone, the bond for title, and took the notes for the remaining purchase money to themselves alone, your orator could not have doubted that they alone were interested."

There is no fraud charged here; these facts are all perfectly consistent with entire good faith on the part of the vendors. A vendor may suppose his title good, and so represent it, when in fact there is a better title outstanding in another. To constitute fraud, therefore, the representation must not only be un-

true, but it must be made with knowledge of its untruth.— This is not charged in the bill, and therefore it cannot be supported on the ground of fraud, which could alone give the Court jurisdiction upon the facts set forth in the bill.

But not only is there no fraud charged in the bill, in relation to the title, but it does not appear from the bill, with that precision and certainty which is required in chancery pleading, that the vendors have not a good title to the land. The supposed outstanding title, is thus set forth:

“Your orator has been informed, and believes, and so charges, that the said Duren and Copeland were not the sole owners of the said land, if indeed they own any part thereof, but that the same was claimed in whole or in part, by others, viz: That a certain Drury Howard, and a certain Eli M. Driver, claimed to be interested in the lands so sold to your orator, but whether said Howard and Driver claim to be interested with both as co-partners, or with only one of them, or if so, with which of them, and to what extent of interest, your orator has never been able, with certainty, to learn, nor does he feel himself able positively to state. To some extent, however, and in some manner, he does charge they were interested at the time of the sale to him, and have so continued, as he is informed and believes.”

These charges are altogether too vague and uncertain, to be the basis of any action in a Court of justice. Instead of charging facts, which could be met and answered, the bill deals in suspicions and conjectures, and on belief founded in rumor and hearsay. Bills of this vague and uncertain character, which call for a disclosure without positive and certain allegations, have been denominated fishing bills; such is the character of this. The rules of chancery practice require, that the facts, as to which a discovery is sought, and the action of the Court demanded, should be stated with reasonable certainty and precision; that the allegations should be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer. It would be an intolerable grievance, if a judgment could be suspended in its operation by statements so uncertain and inconclusive, as those found in this bill.

It may also be remarked, that the bond which it appears was given for the title, is not a part of the record, and the descrip-

tion of it in the bill is so uncertain and unsatisfactory, that it can exert no influence on the decision of the cause.

Let the decree of the chancellor be affirmed with costs.

FRYER, ADM'R V. DENNIS.

1. A party may take out a second execution before the return of the first, at his own cost.
2. An *alias* execution cannot issue after the death of the defendant in execution, without a revival of the judgment, unless such *alias* is issued to continue a lien acquired by a former execution, issued in the life-time of the defendant.

Error to the Circuit Court of Pike county.

JOSEPH H. DENNIS, the defendant in error, brought suit against William Y. Fryer, in the Circuit Court of Pike county, and at the fall term, 1838, obtained judgment for fourteen hundred and forty dollars sixty cents, upon which a writ of *fiери facias* issued on the 8th September, 1838, returnable to the first Monday in March next, after.

On the 1st day of March, an *alias* execution was issued on the same judgment, returnable to the first Monday in March, instant. The record does not disclose that any return was made to either of the executions.

At the Spring term, 1840, Alexander Fryer, adm'r of Wm. Fryer, the defendant in this suit, appeared and made known to the Court, that the defendant, William Fryer, departed this life on the 19th February, 1839, and that he had been duly appointed administrator, and moved the Court to quash the execution last issued because the first execution was outstanding, and also because the same was not issued by the clerk of the Court, as it purports to be, but by one who was acting as deputy, and recognised as such by the Clerk, but who had never been sworn as such deputy; which motion, the Court overruled, and rendered judgment against said adm'r for the costs of the motion.

From this judgment, the said Alexander Fryer, adm'r, prosecutes this writ of error, and now assigns for error, the refusal of the Court to quash the execution last issued.

BUFORD, for the plaintiff in error.

ORMOND, J.—The only error complained of, is the issuance of the second execution, after the death of the defendant, and before the return of the first execution. Both the executions were issued before the first return day after the judgment, the last being after the death of the defendant. It is no objection to the second writ of *fieri facias*, that one had previously issued, as it is expressly authorised by our statute: “where any execution shall issue, and the party at whose suit the same is issued, shall afterwards desire to take out another writ of execution at his own proper cost and charges, the clerk may issue the same, if the first writ be not returned and executed.” Aik. Dig. 159, sec. 2.

The question, whether such execution could issue after the death of the defendant, is one of more difficulty. It has been decided by this Court, after a most elaborate examination of the question in the case of Horn and Collingsworth, 4 Stew. and Porter, 237, that when an execution had issued against a defendant in his life time, that subsequent executions might be issued after his death, to preserve the lien acquired by the first. But in this case, no such necessity could exist, as the second execution was issued before the return day of the first. It was then, an original execution, which there was no authority to issue, after the death of the defendant, without a renewal of the judgment. The Court therefore erred in overruling the motion of the plaintiff in error, and its judgment is therefore reversed, and the cause remanded.

COX v. COOPER.

1. A debt, to be the subject of a set-off, must be a subsisting demand at the time of the commencement of the suit.
2. A surety who pays the debt for which he is bound, after the commencement of a suit against him, for the recovery of a debt which he owes in his own right, cannot, in such action, set off the debt thus paid by him, as the surety of the plaintiff.
3. The suing out the writ is the commencement of the action.

Error to the Circuit Court of Madison.

THE suit in the Court below was brought by the plaintiff in error, as assignee of one Wynne, against the defendant in error, on a note which fell due on the 1st January, 1840. The summons was issued by the clerk on the 5th February, 1840, and executed on the 8th of the same month. The defendant pleaded payment and set off. On the trial, the defendant offered in evidence a note made by Wynne to him, for twenty-five dollars, which fell due on the 25th December, 1839; and proved, that on the 7th February, 1840, he paid a judgment which had been obtained against him about a year previously, as the surety of Wynne, amounting to ninety-one dollars and seventy-eight cents. Upon this evidence, the plaintiff's counsel moved the Court to charge the jury, that a payment by the defendant of a security debt, after the issuance of the writ in this case, did not create a legal set off in this action; which the Court refused to charge, but charged the jury that any debt due to the defendant by said Wynne, before notice of the assignment, or the service of the writ in this case, was a valid off-set.

The defendant obtained a verdict and judgment, from which the plaintiff prosecutes this writ of error, and assigns for error, the refusal to charge, and the charge given to the jury.

ROBINSON, for the plaintiff in error, cited 18 Johnson's Rep. 20; 15 Ser. & Rawle, 61; Chitty on Contracts, 331.

MOORE, contra.

ORMOND, J.—An off-set to be good, must be a subsisting demand at the time of the commencement of the action—such as the defendant could then have maintained an action on. A surety has no right of action against his principal, until he pays the money for which he is bound as surety, and as that was not done in this case, until after process sued out by the plaintiff, the defendant had no demand against Wynne when this suit was commenced, and therefore it could not be the subject of a set-off in this suit.

The Court below appears to have considered the payment of the surety debt a good off-set, because it was paid before *service* of the writ. That this is not correct, will be obvious, when it is considered, that if the suit had been brought by Wynne himself, and the surety debt paid by the defendant after the writ was sued out, it would not have been a good off-set against Wynne, because it would not have been a debt subsisting against him at the time he commenced his action, and it is only when there are mutual or subsisting debts at the time the action is brought, that one can be set-off against the other. Such being the case as between the original parties to the transaction, the assignee cannot certainly be in a worse condition; yet the charge of the Court considers that a good off-set against the plaintiff, which would not be good if the suit had been by Wynne, the payee of the note. The question of notice has no application in this case; the set-off referred to, was not good, not because the defendant had no notice of the assignment, but because he had no claim against Wynne until after the action was commenced.

It follows that the Court erred, both in the charge given, and the charge refused, and the judgment must therefore be reversed, and the cause remanded.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ALABAMA,
JANUARY TERM, 1842.

OWEN, *et al.* v. THE BRANCH BANK AT MOBILE.

1. The notes issued by the Bank of the State of Alabama and its Branches, are not "bills of credit," within the prohibition of the Constitution of the United States.

Error to the Circuit Court of Mobile.

THIS action was commenced in the Court below, on motion, on a note made to the Bank by the plaintiff in error, for a loan of the notes of the Bank.

The pleas interposed in bar of the action, which are very long, and sufficiently described in the opinion of the Court, present two questions; first, the constitutionality of the charter of the Bank in reference to the constitution of the U. States.—Second, the right of the State, to suspend specie payment, on the part of the Bank.

These pleas being demurred to, the Court below sustained the demurrer, and the defendants pleaded over, and moved the Court to charge the jury in substance, that as the notes of the bank were bills of credit, within the meaning of the prohibition of the constitution of the U. States, the Bank could not recover,

which charge the Court refused to give, and the defendants excepted, and judgment having been rendered in favor of the Bank, the defendants prosecute this writ of error, and now assign for error the judgment of the Court sustaining the demurrer to the pleas, and the refusal to charge, as moved for by the plaintiffs in error.

LESSESNE, for the plaintiffs in error, contended that the notes issued by the Bank were bills of credit, within the meaning of the prohibition of the constitution of the U. States, and insisted that the design was to prevent the States from issuing "*paper money*." 3 vol. Madison Papers, 1442, 44th No. Federalist, 212. He insisted that the intention of the State Legislature to violate this provision of the constitution, was obvious, from the preamble to the charter of the Bank. Aik. Dig. 55.

He contended that the notes of the Bank were bills of credit, notwithstanding there was a fund provided for their redemption, and although they were not made a legal tender. To prove this, he cited many of the colonial acts, and referred to the opinion of Judge Story, in *Briscoe v. The Com. Bank of Kentucky*, 11 Peters, 333, and insisted that the constitution could not be evaded by the State, by the appointment of an agent; that the act of the Bank was the act of the State. He cited the case of *Craig v. The State of Missouri*, 4 Peters, 410, and maintained that that case was not so strong as the present because it was only by implication, that the Court came to the conclusion that the certificates issued by the State were designed to circulate as money, but such was the expressed intention in this case.

He also maintained, that the case of *Briscoe v. The Com. Bank of Kentucky*, 11 Peters, 257, was an express authority in his favor, and that this was a stronger case than that, in as much as the "faith of the State was pledged for the redemption of the notes of the bank," and because, by an act of the legislature, the State could be sued in her own Courts; the absence of which, in the Kentucky case, was the ground of the decision.

CAMPBELL, contra, contended, that the Bank was constitutional. He argued that it was a task of great difficulty and delicacy, which devolved on the Court. That a Court will not

declare a solemn act of the legislature void, unless it is clearly and plainly so. 3 Dall. 399; 4 ib. 18; 6 Cranch, 128; 9 Yerger, 499; 7 Pick. 466; 13 ib. 60. That in addition to these considerations, in this case, the constitutionality of the Bank had been asserted by the people in their sovereign capacity, by the adoption of the State constitution; that the principle had been asserted by the people of some of the States; by judicial tribunals of high authority; in the opinions of enlightened statesmen; that this accumulated mass of evidence, as to the constitutionality of the Bank was entitled to the greatest weight.— He referred to the decisions of the Supreme Courts of Kentucky and South Carolina, in 2 Littell, 300; 3 Dana 150; 7 J. J. M. 349; 2 McCord, 12; and to those of the Sup. Court of the U. States, 9 Wheat. 904; 2 Peters, 324; 11 ib. 257. He insisted that the Executive and Legislative departments of the General Government had concurred in these conclusions by selecting these institutions as depositories of the public money.

He referred to the opinion of Gen. Hamilton in his report upon the plan of a national bank, in 1797, to show the true meaning of the term *paper money*; and asserted that it was admitted by the opponents of that scheme, as well as by those in favor of it, that the power existed in the States without limitation, to establish banks whose notes were payable in coin; and cited extracts from the speeches of Mr Madison, Mr Jackson, Mr Stone, Mr Giles, Mr Ames, Mr Gerry, and Mr Vining, to establish his position. He also asserted, that in the discussions on the bank bill in 1810, the weight of authority was decidedly in favor of the right of the States to charter banks.

For the history of paper money in the colonies, he referred to Franklin's Works, 2 vol. 340; 8 ib. 115. That the motive for the prohibition in the constitution of the U. States, was the protection of commerce; that commercial intercourse could not be carried on if each State might enforce the circulation of its paper securities. That to prevent that species of legislation so fatal to the harmony of the States and the integrity of contracts; the States covenanted with each other to pass no law impairing the obligation of contracts, or to change the medium of their fulfilment, and that requisition should not be made upon the citizen to receive any medium of circulation having no better support than State authority.

He defined a "bill of credit" to be *a paper circulated as money under the authority of the State, and obligatory on the citizen*, and referred to Mr Madison's letter to C. J. Ingersoll, for the same opinion, from that eminent constitutional lawyer.

He admitted, that as the State could not be sued, that an emission by the State, directly, of Bank bills, would be unconstitutional, but that here was a corporation liable to be sued, and a fund provided for the redemption of the bills.

He maintained that the pledge of the faith of the State was a mere guaranty which could not be injurious; that the privilege of sovereignty was not thereby conferred on the bank, and that the guaranty was not the bill circulated.

That the act of the legislature authorising the suspension of specie payments, did not interfere with the obligation of the contract, but was merely intended to relieve against the penalty of forfeiture in the charter. Aik. Dig. 57; and in the Constitution of the State, Aik. Dig. XIII. § 6, and that the act opposed no obstacle to a suit by any one.

That the question, whether the Bank had not forfeited its charter by commencing business without the proper amount of specie, could only be inquired into in a proceeding to forfeit its charter. 5 Litt. 45; 3 Hawks, 320; 7 Pick. 370; 4 Gill & Johns. 121; 14 Peters, 131; 9 Wend. 351; 10 ib. 266; 16 Mass. 92; 2 Cranch, 128; 2 Conn. Rep. N. S. 30; 7 Ser. & Rawle, 313; 11 ib. 411.

ORMOND, J.—The question presented on this record is, whether the charters of the Bank of the State of Alabama and its Branches, are not in violation of that portion of the first clause of the tenth section of the Constitution of the United States, which forbids a State to "emit bills of credit."

It is admitted by all Courts to be an exceedingly delicate and highly responsible duty to pass upon the constitutionality of an act of the legislature. It is a duty they would willingly avoid, but which, from the structure of our government, with a written organic law, binding on the legislature as the supreme law of the land, they are sometimes called on to perform.—The difficulty in this case, is still further increased from the fact, that the supposed violation of the constitution of the U. States, has been authorised by the people of this State in their

highest sovereign capacity, in the adoption of the State constitution, authorising the establishment of a State Bank; and when to these considerations, is added the further fact, that the people of this State have an enormous pecuniary interest at stake upon the decision, it must be admitted that a task of greater delicacy could not be imposed on any Court.

The rule of conduct to be observed in such cases, cannot be better expressed than in the language of C. J. Marshall, in *Fletcher v. Peck*, 6 Cranch, 128. "The question, whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implications and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law, should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."

As the violation of constitutional law supposed to exist in this case, is of the constitution of the U. States, our responsibility is greatly abridged by the fact, that our judgment, if wrong, can be rectified by the Federal Judiciary. Indeed, by the examination which this question has already undergone in the Supreme Court of the United States, in the cases of *Craig v. The State of Missouri*, 4 Peters, 410, and *Briscoe v. The Commonwealths Bank of Kentucky*, 11 Peters, 257; our labor is reduced to an examination of the principles decided in these cases; for whatever may be our private opinions, we shall feel it an imperious duty to yield to the authoritative exposition of the constitution of the U. States, made by the Supreme Court.

These decisions are cited, and relied on by the counsel for the plaintiff in error, who maintains that the first cited authority is expressly in point; and that in the last, although the Court affirmed the constitutionality of the charter of the Kentucky Bank, it was upon grounds, and by reasoning, which shows that the Bank of the State of Alabama cannot be maintained.

The case of *Craig v. The State of Missouri*, presented the following facts: By an act of the Legislature of Missouri certificates were authorised to be issued to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars nor less than fifty cents; and were made receivable at the State Treasury in payment of salaries of officers of the State, carrying an interest at the rate of two per cent. A loan office was created for the purpose of lending these certificates to the people of the State. The money arising from the leases of the Salt Springs, and all other debts due the State, was constituted a fund for the redemption of the certificates, and in addition thereto, the faith of the State was pledged for that purpose.

The Court attained the conclusion, that these certificates being issued by a State government, and designed to circulate as money, were "bills of credit," within the meaning of the constitutional prohibition, and that the contract based upon them, was null and void.

The question came again before the Supreme Court, in the case cited from 11 Peters. The Commonwealth's Bank of Kentucky, was a corporation created by, and exclusively the property of the State of Kentucky. The capital of the Bank was two millions of dollars, and consisted of all money to be *afterwards* paid into the Treasury, for the purchase of the vacant land of the State; all moneys received for the purchase of land warrants, and the stock owned by the State, in the Bank of Kentucky, and as the Treasurer of the State received these monies from time to time, he was required to pay them into the Bank. The Bank was authorised to do the ordinary business of a Bank, discount notes, &c., so that its debts were not more than double the amount of its capital.

The President of the Bank was required to report to each session of the Legislature. Its notes were payable in gold and silver, and receivable in payment of taxes and debts due the State. The notes issued by the Bank were in the usual form of Bank notes, and it had the capacity to sue and be sued, to buy and sell property, &c.

By a supplementary act it was declared that the Bank might issue three millions of dollars.

The Court held, that the charter of this Bank, was not a violation of that clause of the constitution of the United States

prohibiting the States from emitting bills of credit ; because the notes were not issued by the State but by the corporation. That they were not issued on the faith of the State. That the notes of the Bank were payable on demand, in gold and silver, and a fund provided for their redemption, which was under the control of the President and directors of the Bank. That the holders of the notes could not sue the State, and could look only to the Bank for payment, and had the means of enforcing it.

The conclusion of the Court, was that the case was plainly distinguishable from that of *Craig v. The State of Missouri*, and indeed, insist that the question had been previously determined, in the case of *the Bank of the United States v. The Planters' Bank*, 9 Wheaton 904, and the *Bank of the Commonwealth of Kentucky v. Wister and others*, 3 Peters 318.

To institute a comparison between these cases and the case under consideration, it is necessary to look into the charter of the Bank of this State.

At the formation of the constitution of the State, rules were adopted for the creation of Banks, to the following effect :

“One State Bank may be established, with such number of branches, as the General Assembly, may, from time to time deem expedient: *Provided*, that no branch Bank shall be established, nor Bank charter renewed, under the authority of this State, without the concurrence of two-thirds of both houses of the General Assembly, and *provided also*, that not more than one Bank, nor branch Bank, shall be established, nor Bank charter renewed at any one session of the General Assembly, nor shall any Bank or branch Bank be established, or Bank charter renewed, but in conformity with the following rules :

1. At least two-fifths of the capital stock, shall be reserved for the use of the State.

2. A proportion of power in the direction of the Bank shall be reserved to the State, equal at least to its proportion of stock therein.

3. The State and the individual stockholders, shall be liable, respectively, for the debts of the Bank, in proportion to their stock holden therein.

4. The remedy shall be reciprocal for and against the Banks.

5. No Bank shall commence operations until half of the capital stock subscribed for, be actually paid in gold or silver,

which amount shall, in no case, be less than one hundred thousand dollars.

6. In case any Bank or branch Bank, shall neglect or refuse to pay on demand, any bill, note or obligation, issued by the Corporation, according to the promise therein expressed, the holder of any such bill, note or obligation, shall be entitled to receive and recover interest thereon until the same shall be paid, or specie payments are resumed by said Bank, at the rate of twelve per cent. per annum, from the date of such demand, unless the General Assembly shall sanction such suspension of specie payments, and the General Assembly shall have power after such neglect, or refusal, to adopt such measures as they may deem proper, to protect and secure the rights of all concerned. and to declare the charter of such Bank forfeited.

7. After the establishment of a general State Bank, the Bank of this State, now existing, may be admitted as branches thereof, upon such terms as the Legislature and the said Banks may agree, subject nevertheless to the preceding rules. See constitution of Alabama, article 6.

In 1823, The State Bank was established, based upon the actual funds of the State then in the Treasury, and a loan obtained on an issue of State bonds. The preamble to the charter which has been adverted to in argument, is as follows: "whereas it is deemed highly important to provide for the safe and profitable investment of such public funds as may now, or hereafter be in the possession of the State and to secure to the community the benefits as far as may be of an extended and undepreciating currency; Be it therefore enacted, &c."

In 1832, the Bank at Mobile, was established, the capital stock of which was two millions of dollars, procured from the sale of the bonds of the State, created for that purpose.

For the management of the Bank, a President and fourteen directors were to be annually elected by the Legislature, and required to make a report to each session of the Legislature.

The corporation was empowered to do the ordinary business of a Bank; to issue notes of a denomination not less than one dollar, with such devices as they might think proper; to deal in bills of exchange and discount notes, not exceeding particular sums, expressed in the charter.

The Bank was prohibited from owing at any one time, more

than twice the amount of its capital over and above money deposited for safe keeping, unless previously authorised by law, to do so, and in such event, the directors consenting to it, were made liable, individually, for such excess: but this provision was not to be so construed, as to prevent the Bank from being liable, and on failure of the Bank to pay, the State, also.

The credit of the State was pledged for the ultimate redemption of the notes of the Bank.

The remedy for collecting debts, was reciprocal for and against the Bank.

The corporation was prohibited from commencing operations, until one half the capital stock was deposited in specie, in its vaults. Aik. Dig. 73.

What then are the points of comparison, between the charter of this Bank and that of the State of Kentucky, and in what do they differ?

In both, a corporation was created for the purpose of banking, not on the credit of the State, but upon a fund provided for that purpose. In both, the corporation so created, had the capacity to sue, and was subject to be sued, and was endowed with all the attributes, necessary to the existence of a corporation. In that case, as in this, the notes were issued not by the State, but by the corporation. There, as here, the Bank was the property of the State, and in that case, as in this, the notes of the Bank were payable on demand, in gold or silver, and a fund provided for that purpose.

It must, however, I think be conceded, that as it regards the fund, provided for the redemption of the paper of the Bank of this State, this case is placed in a much more favorable point of view than that of the Kentucky Bank. For while it cannot be fairly presumed that the State of Kentucky would have granted to private individuals, the privilege of banking upon such a fund as seems to have constituted the capital of the Commonwealth's Bank, the State Bank of Alabama and its branches, were founded upon sound banking principles if any such there be; upon a fund not prospective, or to be created by a loan of the notes of the Bank, but actually provided in gold and silver, and the issues of the Bank restricted within the received established limits.

While it may not be uncharitable to suppose that the State of

Kentucky, was availing herself of her sovereignty, to establish a Bank for her own benefit, upon terms which she would not have granted to her own citizens, the State Banks of Alabama, were founded upon the same principles which must have governed, had the charters been granted to individuals.

There is not, in my opinion, but one conceivable point of difference between the two cases, and that is, that the faith and credit of the State of Alabama is pledged for the ultimate redemption of the notes of her Banks, whilst the charter of the Kentucky Bank is silent upon that point: but this supposed difference is more apparent than real.

What is the faith and credit of a State, and what are its sanctions?

The credit of an individual, is the trust reposed in him by those who deal with him; that he is of ability to meet his engagements; and he is trusted, because through the tribunals of the country, he may be compelled to pay.

The credit of a government, is founded on a belief of its ability to comply with its engagements, and a confidence in its honor, that it will do that voluntarily, which it cannot be compelled to do. As an individual may become responsible upon an implied promise, and be compelled to discharge it, so may a State contract an honorary engagement in the same mode.

If a government creates paper to pass as money, and puts it in circulation, it is as much bound to redeem it without an express pledge to that effect, as if one was made, nor could it possibly obtain circulation without such implication. As there is no difference in reason, or the nature of the thing, between an express or implied pledge of the faith or credit of a government, so neither is there any in law. In either case, the dictates of honor and good faith, would require the State to redeem its pledge, but in neither, could it be enforced by the tribunals of the country. It is therefore my opinion, that there is not a shade of difference between the charters of the Kentucky and the Alabama banks, in this respect.

The mischief sought to be averted by the framers of the constitution in the prohibition that the States should not "emit bills of credit," cannot be evaded by the mere omission of the State, to pledge its faith for their redemption; nor on the other hand does the guaranty of the State, for an emission of paper, as the representative of money, conclusively stamp such paper

the "bills of credit" forbidden by the constitution. - If that were so, then if a State should guaranty the ultimate payment of the notes of a corporation in which it had no interest, and with which it had no connection, such guarantee, would *ipso facto*, convert the notes into the "bills of credit" which the constitution forbids; a proposition which will scarcely be contended for.

However difficult it may now be to define the term "bill of credit," as employed in the constitution, a reference to the contemporaneous history of those times, will show beyond a doubt, what was the evil intended to be remedied.

Dr. Franklin, in a vindication of the paper money system of the Colonies, written in 1764, in answer to a report of the board of trade of Great Britain, in which it had been assailed, defends the practice of the Colonies, upon the ground of necessity. In his defence, he shows that it was what it was called by him "paper bills of credit," having no other basis than the credit of the Colony, which issued it, for its support. He was thoroughly acquainted with the subject, and no where speaks of any actual existing fund for the redemption of the paper thus issued, but on the contrary, speaks of it as a *substitute* for the precious metals, and not as their representative, (Sparks Life of Franklin, 2 vol. 340.)

Mr. Madison, in the 44 number of the Federalist, speaks of the prohibition we are now considering, as intended to deprive the States of the power to emit *paper money, as a substitute for coin.*

Gen. Hamilton, in his celebrated report to Congress, in 1790, advising the charter of a Bank of the U. States, shows, with great clearness, the difference between the "bills of credit" forbidden by the constitution, and the issues of a Bank. He says: "The emitting of *paper money*, by the authority of government, is wisely prohibited to the individual States, by the national constitution, and the spirit of the prohibition, ought not to be disregarded by the government of the U. States. Though paper emissions under a general authority, might have some advantages, not applicable, and be free from some disadvantages which are applicable to the like emissions by the States, separately, yet they are of a nature so liable to abuse, and it may even be affirmed so certain of being abused, that the wisdom of government will be shown in never trusting itself with the

use of so seducing and dangerous an expedient. In times of tranquility, it might have no ill consequence; it might even perhaps, be managed in a way to be productive of good; but in great and trying emergencies, there is almost a moral certainty of its becoming mischievous. The stamping of paper is an operation, so much easier than the laying of taxes, that a government, in the practice of paper emissions, would rarely fail, in any such emergency, to indulge itself too far, in the employment of that resource, to avoid as much as possible, one less auspicious to present popularity. If it should not even be carried so far as to be rendered an absolute bubble, it would at least, be likely to be extended to a degree, which would occasion an inflated and artificial state of things, incompatible with the regular and prosperous course of the political economy.

"Among other material differences between a *paper currency*, issued by mere authority of government, and one issued by a *Bank, payable in coin*, is this: that in the first case, there is no standard to which an appeal can be made as to the quantity which will only satisfy or which will surcharge the circulation: in the last, that standard results from the demand. If more should be issued than is necessary, it will return upon the Bank. Its emissions, as elsewhere intimated, must always be in a compound ratio to the fund and the demand, whence it is evident that there is a limitation in the nature of the thing; while the discretion of the government is the only measure of the extent of the emissions by its own authority. This consideration further illustrates the danger of emissions of that sort, and the preference which is due to Bank paper."

This is evidence of the meaning of the phrase, of the very highest authority, and is conclusive, to show that in the opinion of the writer, *bank notes payable in coin*, were not the "bills of credit" spoken of in the constitution, on the contrary, while he adverts to the power of the general government to issue "bills of credit," he insists that it should not be exercised, at the same time, setting forth the advantages to result from the establishment of a Bank, whose notes were payable in coin.

The evil then, designed to be prevented, was the emission by the States, of *paper money*, properly so called, issued by the mere authority of the government, and resting for support, on the credit of the government. That this was the mischief

intended to be prevented, has been shown by the contemporaneous exposition of this clause of the constitution, by the leading actors in the great drama of the Revolution. If further authority were wanting, it would be found in the fact, that the State Banks of this, and some other States, had no prototypes in Colonial history, from the sad lessons of which the propriety of the prohibition was defended.

Thus, Mr. Madison, in the 41th number of the *Federalist*, says, "that the guilt, consequent on the issues of paper money, by the Colonies, can be expiated no otherwise, than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it."

It may be added, that every argument which can be urged against the constitutionality of a Bank owned by the State, but managed by a corporation, liable to suit, and provided with a sufficient fund for the redemption of its notes, applies with equal force to the individual banking companies created by the States. The notes of the former, are at most, not more liable to become the substitute, instead of the representative of coin, than those of the latter, and in both, the right exists to compel a payment in coin, which in both cases, is beyond the reach of the Legislature. It will follow therefore, beyond doubt or cavil, that if the prohibition of the constitution, upon the States, "to emit bills of credit," is to be understood as prohibiting the emission of *paper money*, in its largest sense, not as the substitute, but as the representative of coin; then, as the States cannot do indirectly, what the constitution forbids to be done directly, no power would exist in the States to charter an individual Bank.

The case of *Briscoe v. The Commonwealth's Bank of Kentucky*, determines that a State may engage in the business of banking through the medium of a corporation, having provided a fund for the redemption of the notes of the Bank. This being conceded, it is impossible to suppose that the mere guaranty of the State, will render the act unconstitutional, as it would be a mere promise to do that which there would be high moral obligation on the State to perform, without such promise. The prohibition of the constitution, is levelled, not at names, but at things, and it is inconceivable, that it should be constitutional for the State to engage in banking, only on condition that it did not promise to redeem the notes of the Bank established by it,

in the event of the failure of the fund provided for that purpose.

In discussing this branch of the question, in the case of *Briscoe v. The Commonwealth's Bank of Kentucky*, Mr. Justice McLean, asks: "were they (the notes of the Bank) issued on the faith of the State."

"The notes (he says, in reply) contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the Bank, and must have been so received in the community."

Although the absence of these characteristics in the notes of the Commonwealth's Bank, may have been a persuasive answer to the question propounded by the learned Judge, it by no means follows as a consequence, that if the faith of the State had been pledged for the ultimate redemption of the notes of the Bank, that they would therefore have been issued on the faith of the State; as in that case, there was a fund for the payment of the notes; so in this, a fund was provided for the redemption of the notes entirely adequate, or at least would have been so considered, in the case of a private stock Bank. The guaranty of the State was wholly unnecessary, and in point of fact, added nothing to the credit of the institution, or its ability to meet its engagements. The paper of the Bank did not circulate on the credit of the State, but because it was redeemable in coin, on demand, at the counter of the Bank.

It may be true, and probably is, that more confidence is felt in the notes of this institution, than if it were not connected with the State, because the faith of the State is a pledge of a higher character than individuals could give; but for the reasons already given, that circumstance could not affect the charter of the Bank.

It has been strongly urged, that by the law of this State, the State may be sued in her own courts; Aik. Dig. 282—and that therefore, a leading argument in the case of *Briscoe v. The Commonwealth's Bank of Kentucky*, fails in this case.

It is true, that the constitution of this State, required the General Assembly to direct in what courts suit may be brought against the State—Art. 6, sec. 9. Pursuant to this requisition, the Legislature passed the act referred to, authorising "the citizens or inhabitants of this State," to institute suits against the State, and requiring the Comptroller to draw his warrant

for the amount of any judgment obtained against the State, in favor of the plaintiff, on the State Treasurer. The obvious design of this law, was to enable those who had claims against the State, to have their justice and amount ascertained in a cheaper and more expeditious tribunal than was afforded by the Legislature itself; but this is a mere permission, an act of grace, which may be withheld, at any time by a repeal of the act, and besides, applies only to our own citizens. It cannot be, that the constitutionality of the charter of the Bank depends on the will of the Legislature, by suffering this act to remain on the statute book, or that the charter of the Bank can be constitutional, as it regards non-residents, and unconstitutional as to our own citizens. When it is said that a State cannot be sued, the meaning is, that a suit would be fruitless, as there is no means of enforcing a judgment against a sovereign State. The law of this State, authorising the State to be sued, would become a dead letter, if the State omitted to place funds in the possession of its Treasurer, to satisfy judgments against it: as has already been stated, the pledge of the faith of the State, is a mere honorary obligation of no legal force or validity—no matter how binding in law, in conscience, or in morals, may be the promise, its performance must depend on the mere volition of the body politic.

The preamble to the charter of the State Bank, was also relied on, as showing either a profound ignorance of constitutional law, or as evidence of an express design to violate the constitution of the United States. It sets forth that it is deemed highly important to provide for the safe and profitable investment of the public funds, and to secure to the community, the benefits, as far as may be, of an extended and undepreciating currency. It is the last member of the sentence, which encountered the special rebuke of counsel.

When this State came into existence, Banks were established in all the States, and bank notes, generally convertible into coin constituted the currency of this, as well as other States of the Union.

The system was established, and the question was not whether it was beneficial, but how it could be best regulated. It is not now, if it ever has been seriously denied, that the States have the power to charter Banks; whether Congress possesses

that power, has been fiercely contested, and cannot be considered as a settled question, notwithstanding the decisions of the Supreme Court of the United States affirming the right. No one however contends, that Congress can directly interfere with the State authorities, in the creation or management of the State banking institutions. If then, the power to regulate and control the Banks, which is but another phrase for regulating the currency, does not exist in the States, it exists nowhere; a proposition which cannot be admitted. Among all the anomalies supposed to exist in, or flow from, the peculiar structure of our Federal and State governments, this is the strangest.

When the first Bank of the United States was chartered in 1790, a powerful argument against the proposed Bank by Mr. Madison, Mr. Jackson, Mr. Stone, Mr. Giles and other eminent men, was, that it would interfere with the right of the States to establish Banks; whilst on the other hand; the advocates of the Bank, distinctly admitted the right of the States. After the bill passed, President Washington, referred to his cabinet for their opinions. Mr. Jefferson, who denied the power of Congress to charter the Bank, insisted that the State institutions were sufficient for the fiscal purposes of the government; whilst Hamilton, who denied the sufficiency of the State institutions, explicitly admitted the right of the States. He says: "It has been stated as an auxiliary test of constitutional authority, to try whether it abridges any pre-existing right of any State, or any individual. The proposed measure will stand the most severe examination, on this point. Each State may still erect as many Banks as it pleases; every individual may still carry on the business of banking, to any extent he pleases."

These eminent men, were fresh from the creation of the constitution of the United States, and most of them had an agency in it; their opinions are of the highest authority, and show conclusively, that the States, by relinquishing the right to "emit bills of credit, to coin money, or to make any thing but gold and silver coin a tender, in payment of debts," did not preclude themselves from regulating the *currency*, so far as that was to be accomplished by the establishment or regulation of banks.

Whether the plan adopted for this purpose, in this and some other States, of securing an efficient control over the currency

by becoming the proprietor, in whole, or in part, of the Banks, is the best which can be devised, as it is an experiment, time alone can develop; but that the preservation of an undepreciating currency, while it consists of bank notes, payable in coin, or which profess to be so payable, is one of the very highest duties of the State governments, is a proposition which cannot be seriously doubted.

The act of 1837, legalizing the suspension of specie payments by the Banks, was merely intended to prevent a forfeiture of their charters, and to save them from the effects of the penalty consequent upon the refusal to pay specie on demand. It was not intended to prevent any one who thought proper, from suing the Bank, and recovering his debt in specie; nor, if such had been the intention, would the law have been obligatory. It is, however, doing great injustice to the Legislature, to suppose any such consequence, as having been contemplated by it in the passage of the law.

In the examination of this case, I have not entered into the consideration of any point presented on the record previously decided by the Supreme Court of the U. States, further, than to show its application to this case, or its want of application. I am perfectly satisfied that the decision made by that Court in the case of *Briscoe v. The Commonwealth's Bank of Kentucky*, (11 Peters, 257,) covers the entire ground of this case. It is the province of that Court authoritatively to decide all questions arising under the constitution of the U. States, and it is the duty of the State Courts, to yield obedience; but were it a matter of doubt, we should still feel it our duty so to decide, as the constitutionality of the charter of the Bank, has not only been approved by the Legislature, but was authorised by the people of the State, acting in their sovereign capacity.

It remains but to add, that it is the unanimous opinion of the Court, that there is no error in the judgment of the Court below, and it is therefore affirmed.

COLLIER C. J.—If the question raised in this cause, could be regarded as *res integra*, I should take occasion to express my views at large, but I consider it as so conclusively settled as scarcely to admit of serious disputation. The interpretation of the Federal constitution, by statesmen of every political

caste, who lived nearest the period of its adoption, conceded to the legislatures of the States, the right to incorporate Banks, with authority to emit their bills, or notes, as the representative of money. Every department of the State governments have recognized the right as unquestionable. And the Supreme Court of the United States, the tribunal of the last resort for the protection of the Federal constitution, where an aggression has been made in such manner as to authorize the interference of the judiciary, have again and again declared that the power is not inhibited to the States. Under the influence of authority so resistless, I can but declare my acquiescence in the opinion of my brother ORMOND.

BRAGG v. CHANNELL.

1. Where a clock pedler, without license, sold a clock, for which the purchaser executed two notes, which afterwards were given up by the partner of the pedler, and a new note, payable to himself, was taken, the latter note is without any legal consideration, in as much as the first notes were wholly void by the statute, and can not be recovered in a suit by the payee.

Writ of error to the Circuit Court of Tallapoosa county.

ASSUMPSIT on a promissory note for fifty dollars. At the trial it was shewn, that in 1837, a clock pedler sold a clock to the defendant, who thereupon executed his two notes, each for twenty-five dollars. This clock pedler had no license to sell clocks. In 1839, the plaintiff, who was a partner of the clock pedler, returned the notes given by the defendant, and took another, payable to himself, for fifty dollars, which had no other consideration to support it. On this state of facts, the Circuit Court instructed the jury, that they ought to find for the defendant. The plaintiff excepted to this opinion, and now seeks to reverse the judgment rendered for the defendant.

THO'S CLAY, for the plaintiff in error.

HEYDENFELDT, contra.

GOLDTHWAITE, J.—The act of 1832, in force when the first notes were executed, provides that all bonds, notes or promises, made to any hawker or pedler, the consideration of which shall be for any clock or clocks, or other goods, wares or merchandize, of any kind whatsoever, shall be utterly void, unless the party selling the same, shall have first procured a license to sell. Aikin's Digest, 411, § 13.

This enactment seems to be decisive of this case. The cancellation of the old notes did not create a sufficient consideration to support the one, subsequently given to the plaintiff. It would be useless to enter upon the inquiry, whether a *bona fide* assignee might not protect himself, if the purchaser thought proper to bind himself, by giving a new note, or even by an express promise to pay the old ones, because that is not the case, and there is nothing to withdraw the transaction from the influence of the statute, except the giving of the new note to one who is shown to be a partner in the trade, rendered illegal by the statute.

Let the judgment be affirmed.

O'NEAL V. GARRETT, USE, &C.

1. The acknowledgment of service of process, indorsed thereupon, subscribed with the name of the defendant, and attested by the clerk, does not authorise the rendition of a judgment by default, unless the acknowledgment, or signature is proved, or admitted in Court to be genuine.
2. Since the passage of the act of 1839, "to abolish attornies fees in certain cases," it is not allowable to render a judgment by default at the appearance term, without the defendant's consent.
3. *Quere?* Is the failure to discontinue in the primary Court, against a defendant not served with process, objectionable on error, where the judgment is only rendered against the party on whom the writ was served.

Writ of error to the Circuit Court of Lauderdale.

THE defendant in error brought an action by petition and summons, on a bill single, against the plaintiff and one Henry

L. Ward. The summons is endorsed as follows: "I acknowledge service of this writ, Sept. 23, 1840."

E. A. O'NEAL."

Test, GEO. W. SNEED, Clerk.

The record does not show that process was served on Ward. At the appearance term, a judgment by default, was rendered against O'Neal, without proving the acknowledgment of service by him, and without a discontinuance of the suit, as to Ward.

WM. COOPER, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—The acknowledgment of service indorsed on the summons, did not authorise the rendition of judgment against O'Neal; but to authorise the Court to consider it as his act, should have been proved or admitted by him in Court, to be genuine. *Welch adm'r v. Walker, et ux.* 4 Porter's Rep. 120; *Rowan v. Wallace, Judge &c.*, 7 Porter's Rep. 171; *Norwood & Chambers v. Riddle*, 9 Porter's Rep. 425.

By the act "to abolish attornies fees in certain cases," approved, February 2, 1839, it is enacted, that from and after its passage, no judgment shall be rendered in any suit at the appearance term, except by the consent of parties, from the failure of the defendant to plead or enter an appearance, as then required by law. In the case before us, the record does not show the defendant's assent to the rendition of the judgment, but it seems to have been taken in his absence, by default. The act cited, declares that it was prematurely rendered, and it is therefore erroneous.

The regular course, where the plaintiff desires to discontinue his action against one of several defendants, not served with process, is to do so in his declaration, (where suit is brought in the usual form) or upon the record. Whether a judgment is reversible for the failure to discontinue in the primary Court, where it is only rendered against the party served with process, or whether such judgment is not an implied discontinuance in itself, are questions which it is unnecessary now to consider. For the other objections, the judgment must be reversed, and the cause remanded.

CRAVENS & JUSTISS v. BRYANT.

1. Where the plaintiff prevails upon a demurrer to a plea in abatement, the judgment is not final, but that the defendant answer over.

Error to the County Court of Tallapoosa.

T. CLAY, for plaintiff in error.

ORMOND, J.—In this case, the defendant pleaded a plea in abatement of the suit, to which the plaintiff below demurred, and the Court sustained the demurrer, and rendered judgment for the debt. This was erroneous. If a verdict had been found against the defendant on an issue in fact, upon the plea, a final judgment should have been rendered for the plaintiff; but if the plaintiff prevails on a demurrer to such a plea, the judgment is not final, but interlocutory only—that the defendant answer over.

Let the judgment be reversed, and the cause remanded.

LEE v. BRYAN.

1. In a case where property levied on is claimed, and after trial is subjected to the payment of the execution, by the verdict of a jury, which also assesses damages for the frivolous claim, it is irregular to render judgment against the claimant for the debt, damages, and costs, to be levied on the property subjected; but such a judgment can not be reversed at the instance of the claimant, because he is not injuriously affected by the irregularity.

Writ of error to the Circuit Court of Barbour county.

A claim was interposed, pursuant to the statute, to certain slaves levied on by the sheriff, by virtue of an execution, in favor of Bryan. The proper issue was submitted to a jury,

Lee v. Bryan.

which returned a verdict, finding the slaves subject to the execution, and assessing the value of each slave. The total value of all the slaves was \$2900, according to the assessment. The verdict also found, that the claim was made for delay merely, and assessed \$125 40, for damages for the frivolous claim, that sum being 10 per cent. on the amount of the execution.—The verdict furthermore ascertained, that \$1318 12, was then due on the execution for debt, interest and costs. On this verdict, the following judgment was rendered: "It is, therefore, considered by the Court, that said plaintiff recover of said claimant, said sum of thirteen hundred and eighteen dollars and twelve cents, that being truly the amount of debt, interest and costs, due upon said execution, and found as aforesaid; and also, the further sum of one hundred and twenty-five dollars and forty cents, for said damages; as also, costs in this behalf, to be levied of the slaves aforesaid."

To reverse this judgment, the claimant prosecutes this writ of error, and assigns, that the Circuit Court erred in rendering judgment against him personally, for the debt, damages and costs, when he was only liable for the damages and cost.

C. LEWIS, for the plaintiff in error, insisted that the statute only authorised a condemnation of the property claimed, but instead of that, the claimant here is made responsible for the entire debt, although the slaves may not produce that sum.

J. G. SHORTER, with whom was Mr BUFORD, contra, denied that any such effect could be produced by the judgement. It was a substantial compliance with the statute, inasmuch as it directs the amount of the execution to be levied out of the slaves. Should these not produce the requisite sum, no execution can go against the claimant personally. As to the damages and costs, it is true, these ought to be paid by the claimant, and the slaves should not be burthened with their payment; but this is an error which does not prejudice the claimant, and therefore, is no cause for reversal. It was so held as to costs, in the case of Fryer v. Dennis, 2 Ala. Rep. N. S. 135; and the principal is identical when applied to the damages.

GOLDTHWAITE, J.—The proper judgment in this case

would have been to declare the slaves subject to the plaintiff's execution, and that he should recover from the claimant the damages assessed by the jury, together with his costs in that behalf expended. *Hughes v. Rhea, Conner & Co.* 1 Ala. Rep. N. S. 609. Although the judgment as rendered, is irregular, and certainly erroneous, so far as it throws the plaintiff on the slaves for his damages, and costs, it cannot be reversed at the instance of the claimant, unless he can show that injury will result to him, if it is permitted to stand. In no aspect in which we can view this case, can we arrive at the conclusion that he is, or can be injuriously affected by the judgment. He, by law is liable immediately for the damages assessed, as well as for the costs, and yet neither can be collected from him, as the judgment now stands. Nor is he liable personally for the debt for which a recovery is erroneously given, because the judgment directs that it shall be levied from the slaves found subject. We are not aware that he could be subjected to the payment of the sum ascertained, even if the slaves were eloigned. We mention this merely to show, that if one slave only had been in controversy, and that one of very little value, the plaintiff would have no remedy on the judgment upon the principle of a *devastavit*, superior to that which he might have on the bond. We might also add, that the judgment, as rendered, is of no other avail to the plaintiff, than to authorise him to have the slaves sold in satisfaction of his debt.

We do not consider the irregularity as attributable to the Court below; it is at most, a mere error of the clerk, whose duty it is to enter judgment on the verdict, according to law; and that ascertains what the recovery is to be, with as much precision, in a case like this, as it does in one in which a verdict is rendered for a specific sum of money.

The judgment must be affirmed, not because it is regular, but because the errors complained of, do not injuriously affect the claimant.

As the judgment has been superseded by bond, and is in form, a money judgment, the damages on affirmance, without instructions to the contrary, might be computed on the debt irregularly recovered. We think it proper to direct, that damages shall be computed alone on the sum for which the claim-

ant is liable, that is, the damages assessed by the jury. The claimant himself ought not to be prejudiced by the irregularity, even in a collateral matter.

ALLEN AND DEAN V. BRADFORD AND SHOTWELL.

1. Where an action is brought by two, it is irregular to render a judgment in favor of one.
2. A judgment may be amended *nunc pro tunc*, although no execution has issued on the original judgment within a year and a day from its rendition; but if a *scire facias* was necessary to authorise the issuance of the execution on the original, the same step must be taken on the amended judgment, as the entry is made *nunc pro tunc*.
3. A judgment *nunc pro tunc* may be entered without notice to the opposite party.
4. Where the record recites, that it satisfactorily appeared to the Court the original entry was irregular, through mistake, &c. it will be intended that the Court was satisfied of the mistake, by legal proof.

Writ of error to the Circuit Court of St. Clair.

The defendants in error declared against the plaintiff in *assumpsit*, on a promissory note, dated the twelfth day of November, 1838, by which the latter, together with John R. Allen, who was not sued, promised to pay to the former, "as administrators of the estate of Samuel J. Bradford, deceased, nine hundred and sixteen dollars and sixty cents," twelve months after date. At the trial term, a judgment by default was rendered against the defendants below, in favor of Bradford alone. Twelve months afterwards, the plaintiffs moved the Court to render a judgment *nunc pro tunc*, pursuant to the papers in the cause, which motion was granted, and judgment entered accordingly. This latter judgment recites that the mistake in the rendition of the first, was made satisfactorily to appear to the Court, and was thereupon rendered *nunc pro tunc*, in favor of both the plaintiffs in the action.

W. B. MARTIN, for the plaintiffs in error. The first judgment in favor of Bradford, was confessedly erroneous. The second was also irregular. 1. Because no execution had issued on the

first, and twelve months had elapsed from the time of its rendition. 2. Because the record does not show, that notice of the motion for a judgment *nunc pro tunc*, was given to the defendants. Though this Court has been liberal in correcting judgments, yet none of the cases are analagous to this.

No counsel appeared for the defendant.

COLLIER, C. J.—It is undoubtedly true, that the first judgment is irregular in being rendered in favor of one of the plaintiffs only.

It is no objection to the amended judgment, that no execution had issued within a year and a day, on the original judgment, but if a *scire facias* was necessary to entitle the plaintiff to an execution, when the amendment was made, the amendment which was an entry *nunc pro tunc*, would not in this respect, place the plaintiffs in a better condition.

This Court has repeatedly holden, that a judgment *nunc pro tunc* may be entered, though no notice is given to the opposite party. *Fuqua and Hewitt v. Carriel and Martin*, Minor's Rep. 170; *Clemens v. Judson and Banks*, *ibid.* 395. In point of law, no inconvenience can result from the want of notice, as such judgments are always founded on matter of record, or some entry or memorandum in the cause, and cannot be gainsayed by showing to the Court extraneous facts. A judgment *nunc pro tunc* is merely consummating what the Court had ordered; or but imperfectly performed; and as it has a retrospective relation, nothing that has occurred *post factum* can be presented in opposition to it.

The declaration sufficiently shows in whose favor the judgment of the Circuit Court should have been rendered, and in the absence of any other memorandum or entry, furnished a sufficient warrant for the judgment *nunc pro tunc*. But if any thing farther was necessary, it might perhaps be intended from the recital in the record, that it was satisfactorily shown to the Court, the first entry was irregular through mistake; that the Court was satisfied by legal proof. See *Thompson v. Miller*, 2 Stew't. Rep. 470; *Draughan and others v. The Tombeckbee Bank*, 1 Stew't Rep. 66; *Wilkerson v. Goldthwaite*, 1 St. & P. 159; *Mays, et al. v. Hassell*, 4 S. & P. Rep. 222.

The consequence is, the judgment must be affirmed.

JONES v. PHARR.

1. A presentment of a claim against an estate, within the time required by law, to the executor or administrator, is sufficient, without establishing at that time, its justice.

Error to the Circuit Court of Wilcox.

EDWARDS, for defendant in error.

ORMOND, J.—The only question arising in this case, is presented on a bill of exceptions taken, pending the trial below.—The suit being against the plaintiff in error, as the administrator of one Harris, on an open account, he moved the Court to charge the jury, that the plaintiff could not recover, unless he proved a presentment of the account, authenticated by affidavit, to the defendant, within eighteen months after his administration. This charge the Court properly refused; as was held by this Court in the case of Evans v. Norris, Stodder & Co. 1 Ala. Rep. 511 It is in such a case, necessary for the plaintiffs, when the statute of non-claim is pleaded (as was done here) to prove a presentment of his demand to the executor or administrator, within the time limited by law, as part of his case. But he is not required to establish the justice of the claim at the time of presentment, as appears to have been supposed necessary by the counsel below, in his motion to the Court for instructions; and the motion was therefore properly refused.

Let the judgment be affirmed.

HARPER V. HOWARD.

1. When a motion is made, in the mode provided by statute, against a justice of the peace, for a refusal to pay over money collected by him, in his official capacity, he will not be permitted to set-off costs due to him in other cases, for the payment of which the plaintiff may be liable.

Writ of error to the Circuit Court of Tallapoosa county.

Appeal from a Justice's Court, before which the plaintiff, in a motion made pursuant to the statute, obtained judgment for twelve dollars. In the Circuit Court it appeared that the plaintiff placed several notes and accounts with the defendant, as a justice of the peace, for collection. All were sued; on some the money was collected, and on others the executions were returned *nulla bona*. The costs on the latter exceeded the sum collected; and refused to be paid over, it being retained in payment of the costs of the other cases. On this state of facts, the Circuit Court gave judgment for the defendant; to reverse which the plaintiff prosecutes this writ of error.

THO'S CLAY, for plaintiff in error.

HEYDENFELDT, contra.

GOLDTHWAITE, J.—This proceeding is not governed by the rules which might prevail in the ordinary action for money had and received, in which it is probable that the defendant's right to set off his demand, could not be refused.

The statutory remedy, by motion, is to be governed by the same principles as control motions against other public officers. The claim of a sheriff, or of the clerk of a Court, to off-set his private demand against money collected by him, or coming to his hands in his public capacity, would be disallowed without scruple, when the extraordinary powers of a Court were invoked to compel a payment; and we conceive a justice of the peace stands in precisely the same relation to the suitor before him. No public officer ought ever to be permitted to commingle his private claims with his official duties. In this case, the

fees for which the plaintiff is liable, had no immediate connexion with the money retained by the defendant; they constituted nothing more than an ordinary debt, and if a set-off was now allowed, there is no reason why the same right would not extend to any other indebtedness.

Let the judgment be reversed, and the cause remanded.

TAYLOR, *et al.* v. POWERS, USE, &C.

1. Although by statute, an execution may issue upon a delivery bond, which is returned "forfeited," yet a writ of error will not lie for the purpose of revising the bond; if too defective to sustain an execution, the defendant may obtain a *supersedeas*, or if the defect be not available at law, in a proper case, he may go into Equity.

Writ of error to the Circuit Court of Tallapoosa.

T. CLAY, for the plaintiff.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—A writ of error has been prosecuted in this case, for the purpose of revising a forthcoming bond taken by the sheriff of Tallapoosa, on levying a writ of *fieri facias*, upon the allegation, that the bond is defective, and does not authorise the issuance of an execution.

Without examining the errors assigned, we will inquire, whether a writ of error is the appropriate remedy in the present case.

Where a writ of error is resorted to, as a common law remedy, for the purpose of bringing a cause here, it can only be issued from this Court; for it is only in virtue of a statute that the primary Courts issue such writs. But even conceding that the proceedings are regular, the case is one which cannot be entertained. A writ of error lies only for the revision of the mistakes of Courts of record, and then only when the proceedings are according to the course of the common law. Woods v. Young, 4 Cranch's Rep. 237; Nichols *et al.* v. Wolfersberger,

6 Serg't & R. Rep. 167; *ex parte* Tarlton, 2 Ala. Rep. N. S. and cases cited.

It is declared by statute, that it shall be the duty of the sheriff or coroner, within ten days after the forfeiture of a delivery bond, to return the same, together with the execution, endorsed forfeited; and in five days after such return, the clerk shall issue an execution on the bond, against all the obligors therein. Aik. Dig. 171. Such is the effect of the bond, without any order or judgment of the Court thereon. If, however, it is defective, the obligors have a very plain and simple remedy. If the defect appears on the face of the bond, execution may be superseded; and if the objection is one, that cannot be reached at law, chancery can afford adequate redress. But as there is no order or judgment of a Court of record complained of, the writ of error improvidently issued, and is therefore dismissed.

WHITE & BINGHAM V. SHANNON.

1. An order of the Circuit Court to sell land, levied on by a constable, is not such a final judgment as a writ of error will lie from.

Error to the Circuit Court of Tallapoosa.

HEYDENFELDT, for plaintiff.

T. CLAY, contra.

ORMOND, J.—This was a motion in the Circuit Court of Tallapoosa, to sell land levied on by a constable. The proceeding is founded on a statute which declares, "that whenever it shall become necessary for want of personal property, to levy an execution, issued by a justice of the peace, on land, it shall be the duty of the officer levying such execution, to return the same to the next Superior Court of his county, and such Court shall, on motion of the plaintiff, and it appearing by the exhibition of the proceedings before the justice, that the same have been regular, to order a sale of such land, or whate-

ver part thereof may be necessary to satisfy such execution." Aik. Dig. 164.

The design of the legislature appears to have been, to provide record evidence, by which the purchaser of land sold under an execution of a justice of the peace, if compelled to sue to obtain the possession, might establish his right, without trusting to the uncertain and fleeting memoranda of a justice of the peace. The action of the Court is confined to an examination of the proceedings before the justice, and if they are regular, it orders a sale of the land. This is not a final judgment, or any thing in the nature of one. It is at most, a confirmation of the levy made by the constable. The statute evidently contemplates that the whole proceeding is to be *ex parte*. If the process issues irregularly from the Circuit Court, it may be superseded, and in the possible, though highly improbable event, that the supposed proceedings were fictitious, ample redress would be found in the means now provided by law for the redress of grievances.

It results from what has been said, that no writ of error can be prosecuted to this Court in such a case as the present, and the writ of error is therefore dismissed.

BROWN, et al. v. WHEELER.

1. When a statute gives a summary remedy, by motion, and is silent with respect to the notice to be given to the defendant, he is entitled to reasonable notice. To support a judgment in such a case, it must affirmatively appear that such notice was given, and such notice will not be inferred from a statement on the record, that the parties came by their attorneys.
2. In the summary proceeding given by statute, in favor of a security against his principal, to recover money paid on a judgment, it is necessary to connect the instrument, by which the security was bound, with the judgment paid by him.
3. In such a case, if judgment is rendered for interest on the sum paid, the record must show the time when the security paid the debt, if the liability is not ascertained by verdict.
4. *Query*—Whether any summary proceeding can be had under the act of 1821, by the surety to a writ of error bond, when the judgment is rendered against him in the Supreme Court, inasmuch as the motion is to be made in the Court where the judgment was rendered.

Writ of error to the Circuit Court of Barbour county.

THE only proceeding of record in this case, is the following judgment entry :

Green B. Wheeler v. Samuel N. Brown, Daniel McKenzie and Francis W. Pugh.

And now at this day came the parties by their attornies, and it appearing to the satisfaction of the Court, that a writ of *feri facias* has heretofore issued out of this Court, at the instance of Wilson M. Bates, against the goods and chattels, lands and tenements of Samuel N. Brown, Daniel McKenzie, Francis W. Pugh, William Brown and Green B. Wheeler, for the sum of two thousand two hundred and eighty-seven dollars and twenty-six cents, debt, and two hundred and twenty-eight dollars and seventy-two cents damages, together with the sum of twenty-nine dollars and six cents, costs; and that the sum of two thousand dollars has been paid on said writ of *feri facias*, by the sale of the property of Green B. Wheeler; and it having been shewn to the satisfaction of the Court, that the said Green B. Wheeler was the security of said Samuel N. Brown, Daniel McKenzie and Francis W. Pugh, on a writ of error bond, upon a judgment obtained in this Court against the said Samuel N. Brown, Daniel McKenzie and Francis W. Pugh, for the said sum of two thousand two hundred and eighty-nine dollars and twenty-six cents, besides costs. It is, on motion, considered by the Court, that the said Green B. Wheeler recover of the said Samuel N. Brown, Daniel McKenzie and Francis W. Pugh, the said sum of two thousand dollars, with interest thereon, from the 1st day of January, 1841, together with costs, for which execution may issue.

The defendants seek to reverse this judgment.

1. Because they had no notice of the motion.
2. Because there is no declaration or allegation.
3. Because no issue was made, or tendered to the defendants.
4. Because the facts were found by the Court without the intervention of a jury, and because the defendants had no election.
5. Because judgment was not rendered against William Brown, jointly with the defendants.

6. Because it does not appear that the defendants were the sureties of the plaintiff, with respect to the identical execution on which the money was paid.

7. Because judgment was rendered for the amount paid, with interest from a given day, and the record does not show when the money was paid.

8. Because the judgment is void, for uncertainty in awarding interest from a day anterior to its rendition, without proof, showing how much had accrued.

Buford, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—We presume this suit was commenced with a view to the summary remedy given by the act of 1821. This act provides that “in all cases where judgment shall be entered up in any Court of record, or by any justice of the peace, against any person or persons as security or securities, their executors or administrators, upon any note, bill, bond or obligation, and in all cases where execution shall be awarded by or issued from any of the Courts of record, or by any justice of the peace, against any person or persons as security or securities, his, her or their heirs, executors, or administrators, upon any bond, obligation or recognizance, and the amount of such judgment or obligation, or any part thereof, hath been paid or discharged by such security or securities, his, her or their heirs, executors or administrators, it shall be lawful for such security or securities, his, her or their heirs, executors or administrators, to obtain judgment by motion, against such principal obligor or obligors, recognizor or recognizers, his, her or their heirs, executors or administrators, in any Court, or before any justice of the peace, where such judgment may have been entered up, and execution awarded against such security or securities, his, her or their heirs, executors or administrators, for the full amount which shall have been paid, with interest thereon, from the time the same shall have been paid and satisfied, until such judgment be discharged.” Aikin’s Digest, 384, § 3.

Although this enactment does not expressly require that notice of the motion should be given to the defendant, we think

it would be most unreasonable to suppose that a mere *ex parte* proceeding was intended. We have, heretofore, considered notice as essential to the validity of judgments, under statutes similar in principle. Reed, *et al.* v. Jackson, 1 Ala. Rep. N. S. 207; Kirkmans v. Hawkins. 1 Porter, 22.

The repeated decisions which have been made in this Court in cases of summary proceedings, by banks and against sheriffs, leave but small space for farther adjudication by us, on any of the many statutes by which a like remedy is given, and we cannot but think that a reference to some few of those decisions, would effectually prevent any error from intervening. In Curry v. The Bank of Mobile, 8 Porter, 372, we say that, "in cases of this summary character, the judgment, whether by default or otherwise, must show, affirmatively, every fact necessary to give the Court this summary jurisdiction. In judgments by default, the liability of the defendant must also be shown. When an issue is made up, the verdict will ascertain the defendant's liability, as in other cases of suits commenced in the ordinary mode, and it is [in the case of an issue tried] unnecessary to encumber the record, either with the proof or fact of notice, or of those facts which constitute the liability for the debt." In Bondurant v. Wood and Adams, 1 Ala. Rep. N. S. 542, we considered the submission of a cause to the decision of the Court upon a statement of facts, as equivalent to an issue, for the purpose of inferring that the parties were regularly before the Court, either having had, or waiving, notice. No such implication arises from the fact stated in this record, that the parties came by their attorneys. Notice of the motion was necessary to authorise the summary jurisdiction exercised by the Court, and as this is not shewn, the judgment cannot be supported.

•2. But independent of this, the liability of the defendants does not appear; there is nothing to connect the bond with the execution, or which shows the rendition of any judgment on the bond to warrant the execution.

3. With respect to the interest, the judgment is also defective, because no fact is stated from which the time of payment can be inferred.

It is also deserving of consideration by the plaintiff, whether any summary proceeding can be had by the security against his principal, on a bond for a writ of error to the Supreme

Kemp, *ex dem.* Pollard's heirs v. Thorp, *et al.*

Court, inasmuch as the statute directs the motion to be made in the Court where the judgment was rendered.

We will likewise take this occasion to remark, that the case of Clements, *et al.* v. The Branch Bank, 1 Ala. Rep. N. S. 50, points out with sufficient precision, the form of proceeding, applicable to most, if not to all, of the statutes which give summary remedies by motion.

Let the judgment be reversed, and the case remanded.

KEMP, *ex dem.* POLLARD'S HEIRS v. THORP, *et al.*

1. The Congress of the United States does not possess the constitutional power to grant the shore of the navigable waters in this State. The cases of *The Mayor, &c. of Mobile v. Eslava*, and *Hagan, et al. v. Campbell and Cleaveland*, explained and re-affirmed.

Writ of error to the Circuit Court of Mobile.

THE facts of this case are substantially the same as those of *The Mayor, &c. of Mobile v. Eslava*, 9 Porter's Rep. 577, and *Doe ex dem. Pollard's heirs v. Files*, at the last term.

BLOCKER, for the plaintiff in error, and STEWART and CAMPBELL, for the defendant, submitted the cause on the brief of the plaintiff's counsel.

COLLIER, C. J.—The questions arising in this cause, were so fully considered in the *Mayor, &c. of Mobile v. Eslava*, 9 Porter's Rep. 577, and *Doe ex dem. Pollard's heirs v. Files*, at the last term, that we should content ourselves by announcing a judgment of affirmance, were it not for a remark or two in the brief of the plaintiff's counsel, which induces the belief that the case first cited, as well as the earlier decision of *Hagan, et al. v. Campbell and Cleaveland*, 8 Porter's Rep. 9, have been misapprehended. These cases, it is supposed, are in conflict with each other. In the latter, the only questions raised in ar-

gument were, whether the southern boundary line of the land in controversy, should run due east to the channel of the Mobile river, or should diverge so as to accommodate other riparian proprietors, who might otherwise be injured in consequence of the meandering of the stream; or whether the eastern boundary extended beyond high water mark. No objection was made to the validity of the Spanish grant, as confirmed by Congress. The confirmatory act passed between the periods providing for the admission of Alabama into the Union, and the formation of her constitution, and the Court regarded it as conceded, that the grant was operative to the extent which its terms indicated; and these we considered sufficient to transfer the shore. In *The Mayor, &c. of Mobile v. Eslava*, neither of these questions were presented for decision. We there examined, whether the King of Spain had the right to grant the shore of the navigable waters within his American possessions, and whether the Congress of the United States possessed a similar right over the shore of the tide waters of this State, after her admission into the Union. A mere statement of the points adjudicated in these cases, will be quite sufficient to show, that the suggestion, that they are not in harmony with each other, is entirely unsupported by any thing found in the opinions of this Court.

It is further intimated, that the opinion of this Court in the latter case, asserts the principle, that by the admission of Alabama into the Union "on an equal footing with the original States," the Government of the United States *ipso facto*, relinquished to her all the unappropriated lands within her limits.— This intimation will be found to be utterly unsustained, when the case is fully examined and fairly criticised. At the time the opinion was prepared, we were aware this question was one about which statesmen differed, and distinctly recollected that it was debated in the Senate of the United States in 1828. This consideration, as well as the additional reason that the point did not necessarily arise in the cause, were quite enough to prevent us from performing a task so unwise and profitless, as to adjudicate an abstract question of political law, which involved millions of property.

The correct mode of criticising a judicial opinion, is, not to take up isolated sentences, or detached paragraphs, but to examine the points presented, and then consider the entire argu-

ment of the Court. Any other course might be exceedingly unjust, as the qualification of a general remark, may either precede or follow it.

The argument of the Court in *The Mayor, &c. of Mobile v. Eslava*, was intended to show that the shore of the tide waters in this State (to borrow a term from the civil law) was withdrawn from commerce, and dedicated to the public use. This conclusion was attempted to be sustained. 1. By the acts of Congress, regulating the survey and disposal of the public lands, as well as the act providing for the establishment of a territorial government. The laws in regard to the surveys, clearly indicate that the shore of the navigable waters were not to be surveyed. The act of 1803, providing for the disposal of lands South of Tennessee, declares *in totidem verbis*, "that all navigable rivers within the territory of the United States, south of the State of Tennessee, shall be deemed to be and remain public highways;" and the ordinance establishing a territorial government, contains a similar provision. 2. The act of March, 1819, to enable the people of the Alabama territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," declares that "all navigable waters within the said State, shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost or toll therefor, imposed by the State." Alabama being admitted into the Union "on the same footing as the original States, in all respects whatever," without a reservation by Congress of a property in her navigable waters, or the soil covered by them, she must be considered as having the same interest in them, "as the original States" have in their tide waters; which interest is uncontrollable by the federal government, except so far as it may be necessary to enable it to exercise its constitutional powers. This conclusion was supposed to result from the previous acts of dedication by Congress, both express and implied, and the terms in which the reservation in the act of March, 1819, of a right of use by the public, in the navigable waters of the State, is expressed. There, it is declared, that the navigable waters of the State shall forever remain public highways, free to its citizens, &c. The omission to stipulate for a right of property, was regard-

ed as satisfactory to show, that a mere easement was reserved, or in other words, it proves there was to be no other limitation to the right of the State over the subject, than that which is expressed. *Expressio unius, exclusio est alterius.*

What is said by the Court of a property in the shore passing to the State upon its admission into the Union, cannot, when fairly interpreted, be understood to mean the absolute ownership, but merely the right of jurisdiction and control, subject to the paramount right, which is repeatedly conceded to the public, and which the United States may protect.

It is difficult to give an intelligible view of the argument in the Mayor, &c. of Mobile v. Eslava, in the short space we have occupied, but what we have said, will serve to repudiate the inference drawn from the opinion.

Whether an admission of a State into the Union, *on the same footing as the original States*, means any thing more than an equal participation in political rights and privileges, is a question never presented for our consideration, or examined by us. Some disconnected sentence or paragraph may perhaps be supposed to claim for these terms, a more extensive meaning, but when considered in reference to the subject matter and the context, the extent of their operation it will be seen, has not been decided; and we are quite sure, that in no opinion of ours, have we accorded to them greater potency, than did the Supreme Court of the United States, in New-Orleans v. The United States, 10 Peters' Rep. 736. Our object in saying thus much was, only to disabuse the plaintiff's counsel, and others who may have fallen into a similar error; and we have only to add that the judgment of the Circuit Court is affirmed.

YOUNG V. THE ADM'RS OF McLEMORE.

1. The oath which the act of 23d December, 1837, to obtain the testimony of a party to the suit, requires to be made of the materiality of the testimony sought to be obtained, may be made by a stranger to the suit, and therefore sufficient if made by the attorney of the party.
2. The failure of the defendant to answer interrogatories thus filed, would authorize a judgment by default against him, and be an admission that the plaintiff was entitled to some damages; but judgment final could not be rendered without the intervention of a jury, except for nominal damages, in a case where the clerk could not compute the damages.

Error to the Circuit Court of Tallapoosa.

THIS was an action of *assumpsit*, commenced in the Court below, by the intestate of the defendants in error, against the plaintiff in error. Whilst the cause was pending, the plaintiff filed interrogatories, under the act passed in 1837, to provide more effectually for discoveries in suits at common law, which the defendant was called on to answer. The plaintiff's attorney having made affidavit that the evidence of the defendant was material to the trial of the cause, the Court, on motion, made an order that the defendant file his answer to the interrogatories, within sixty days.

At a succeeding term of the Court, the following judgment was rendered. "This day came the parties, by their attorneys, and it appearing to the Court, that interrogatories were filed for the defendant to answer, which he failed to do, therefore it is considered by the Court that the plaintiff recover of the defendant, the sum of ——— dollars, the damages in the declaration mentioned, together with the costs in this behalf expended, &c.

From this judgment, this writ of error is prosecuted, and the following errors assigned:

1. The Court erred in rendering judgment by default final, without the intervention of a jury.
2. The oath establishing the materiality of the interrogatories, should have been made by the plaintiff.

T. CLAY, for plaintiff in error.

HEYDENFELDT, contra.

ORMOND, J.—The questions of law, arising in this case, grow out of a statute passed 23d December, 1837, the design of which, was to supersede the necessity of resorting to chancery, to obtain a discovery of facts, resting in the knowledge of a party to the suit. The act requires the Court to be satisfied of the materiality of the testimony sought to be obtained by “the oath of the party filing the same or *otherwise*,” and it would be strange, if greater credence should be given to the oath of an interested party, than to that of an unbiased witness. It might indeed be questioned, whether any oath was necessary; but certainly the oath of the attorney of the plaintiff will satisfy the demands of the statute.

The first assignment of error, is well taken. The statute provides, “that if the party to whom such interrogatories shall be propounded, be defendant in the action, it may set aside his plea or pleas and give judgment against him by default.” The effect then of the contumacy of the defendant, is precisely the same as if after service of process, he had failed to appear and plead. This would authorise the rendition of a judgment against him by default, and would in such a case as the present, be an admission that the plaintiff was entitled to some damages, the amount of which, could only be ascertained by a jury; and although the plaintiff, in the absence of proof, would be entitled to nominal damages, the damages actually sustained can be ascertained only through the intervention of a jury. The statute which authorises the clerk to compute the damages in certain cases, does not apply to a case like the present. For this error, the judgment must be reversed, and the cause remanded.

McDONALD v. HUSTED.

1. A note made negotiable and payable at Bank, is not subject to off-set in the hands of a *bona fide* indorsee, who has acquired it previous to maturity, although it has never been negotiated at the Bank where it is made payable.

Writ of error to the Circuit Court of Sumter county.

ASSUMPSIT by the plaintiff as indorsee against the defendant, as the surviving maker of a promissory note, in these terms:

14th April, 1836.

\$659 10-100.

Twelve months after date, we promise to pay, Hurlbutt & Collins, six hundred and fifty-nine 10-100 dollars, value received, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile.

A. McDONALD & CO.

At the trial, it was admitted by the defendant, that the note was assigned and endorsed by the payees to the plaintiff, previous to its maturity, and lodged with the Bank for collection. The defendant then produced and offered in evidence, a promissory note, made by the said Hurlbutt & Collins, to one Isaac Osgood, also negotiable and payable as aforesaid, of earlier date and maturity than the note of the defendant, and indorsed to him by the payee. It was also admitted that the last mentioned note was purchased by the defendant, after the maturity and assignment of his note, the subject of this suit, but before McDonald & Co. had received notice of its assignment.

Upon this state of facts, the Court instructed the jury, that if the note sued on, was negotiated to the plaintiff, for a valuable and adequate consideration, previous to its maturity, and without notice of an off-set against it, then it was protected in the hands of the plaintiff, against the off-set held by the makers of the note, against Hurlbutt & Collins, although the said note might never have been negotiated to, or become a part of the property of the Bank.

The defendant excepted to this charge, and seeks to reverse the judgment rendered against him, for its supposed error.

J. G. BALDWIN, for the plaintiff in error, insisted, that the defence was not cut off by the law merchant, because that is abrogated by the act of 1812, nor by the statute, because the act referred to, is general in its provisions, allowing off-sets by the payee, in all cases of assigned paper, and excluding no class of notes, &c., whatever; nor by fraud because there is no *mala fides* shown; nor by the contract itself, because the undertaking is only that it shall be negotiable at the Bank, on which contingency alone the maker agrees to waive the right given by the statute. *Stewart v. Anderson*, 6 Cranch, 203; *Aikin's Dig.* 328, § 6; *ib.* 329, § 11; *Emanuel v. Atwood*, 6 Porter, 384; *Mandeville v. Union Bank*, 9 Cranch, 9; *McMunn v. Sona*, 4 Howard, 162.

REAVIS, contra,—cited *Emanuel v. Atwood*, 6 Porter, 384; *Robertson v. Breedlove*, 7 Porter, 541; *Mandeville v. Union Bank*, 9 Cranch, 9.

GOLDTHWAITE, J.—The precise question involved here has never been directly before the Court, though the case of *Emanuel v. Atwood*, 6 Porter, 384, tends directly to support the opinion of the Circuit Court.

The principle there decided is, that it is competent for the maker of a note, to stipulate with the payee, that no advantage shall be claimed of any off-set, if the note shall come to the hands of a *bona fide* holder by indorsement.

The vice of the argument of counsel, consists in considering the stipulation in this note, as confined to the Bank, when in truth it is general. The maker stipulates that the note shall be negotiable, and also payable, at the Bank. If by the contract, it was intended only that the Bank should be benefited, the intention would have been more clearly expressed by other terms.

A very slight change in the terms of this contract, will show very clearly, that the parties could only have intended to make the note negotiable generally, and not specially. If we strike out the Bank, and insert the store of A. B., as the place where it is to be paid, no one would suppose it should

The Farmers' Bank of Chattahoochie v. Reid, sheriff, &c.

also be negotiaed to A. B., to preclude the maker from insisting on an off-set against any other *bona fide* holder. We cannot conceive why any other inference should be drawn in this case, because the note is payable at a Bank.

We are entirely satisfied that this note must be construed as an agreement, to waive the statute in favor of any *bona fide* indorsee.

Let the judgment be affirmed.

THE FARMERS' BANK OF CHATTAHOOCHE V. REID, SHERIFF,
&C. AND BENSON, HIS SURETY.

1. The payment of an execution to a sheriff, *on the first day of the term of the Court to which it is returnable*, is unauthorised; and if the money is retained by the sheriff, the plaintiff can not recover of him and his sureties, on motion, for the failure to pay it over, on demand.

THIS was a proceeding by notice and motion, in the County Court of Montgomery, at the instance of the plaintiff in error, against Reid, as sheriff of that county, and his surety, for a judgment, for the failure of the former to pay over, on demand, the money collected by him, on an execution issued from that Court, at the suit of the plaintiff, against Samuel Q. Hale.

An issue was made up, and the case was tried by a jury, who found specially, that the execution described in the motion was placed in the hands of the sheriff, while he was in office, as alleged by the plaintiff, and that he received the amount thereof on the *first day of the term of the Court to which it was returnable*. They further found that about fourteen days after the receipt of the money on the execution, the same was demanded of the sheriff by the plaintiff's attorney, but he failed and refused, and still fails and refuses to pay it, and that Benson was at the time of the receipt of the execution and money thereon, and still is a surety of the sheriff in his official bond. On this verdict, the County Court rendered a judgment against

the defendants, for the amount of the execution, with interest, damages and costs.

To review the judgment of the County Court, the defendant sued a writ of error to the Circuit Court, upon which that judgment was reversed and rendered, the plaintiff not desiring the cause to be remanded, and a writ of error has been prosecuted to this Court, with a view to the revision of the latter judgment.

HILLIARD, for the plaintiff in error.

HARRIS, for the defendant in error.

COLLIER, C. J.—It is insisted for the plaintiff in error, that notwithstanding the act of 1821, makes it the duty of sheriffs, “to return all writs and executions to the clerk’s office from which they shall issue, at least three days previously to the term of the Court to which they shall be returnable,” yet a payment to the sheriff on the first day of the term to which an execution is returnable, and while the same is in his hands, will be regarded as made thereon, and subject the sheriff and his surety to a motion and judgment for not paying over the money to the plaintiff. If the point made by the plaintiff, was *res integra* in this Court, we should be inclined to accord to the argument, great weight, and perhaps be constrained to admit its justness. But there are several cases adjudicated by our predecessors, which have been too long acted on to authorise us to treat the question now raised, as open for consideration, and our duty may be sufficiently discharged by a brief review of the cases.

In Neale, *et al.* v. Caldwell, 3 Stew. Rep. 134, which was a proceeding by motion, against a sheriff and his surities, for the failure to return an execution within the time prescribed by law, the defendants attempted to show in their defence, and as an excuse for not returning the execution, that the same had been levied, and was retained until after the sale of the property, which took place on the first day of the term of the Court to which it was returnable, and that on the next day, it was returned. It was held that the act of 1821, was *inoperative*, and “the simple fact to be determined by the Court, was, had the sheriff returned the execution three days before the term, or rendered a sufficient excuse for not doing so.” And further, “the

force of the execution was spent on the return day" and could be no authority to the sheriff any longer, though as the levy vested him with all the legal title of the defendants, he might sell without it. See also *Roberts and Battle v. Henry*, 2 Stew. Rep. 45. In *Barton, et al. v. Lockhart*, 2 Stew. & Por. Rep. 109, one of the questions raised upon the record was, whether the payment of money to a sheriff after, or on the first day of the Court, to which an execution was returnable, was to be considered in law as a payment thereof, so as to authorise a motion against the sheriff and his sureties for a failure to pay it over to the plaintiff on demand. The Court said, "to pay the amount of an execution to a sheriff after the return term has arrived, does not amount to a satisfaction of that execution. The execution has become *functus officio*, and no proceeding can be had under it. After such payment is made, the plaintiff might sue out another execution, and have the money collected by virtue of it, if the sheriff were to fail to pay the money to him; and no motion can be made against the sheriff for money so received, under any of the statutes; he must be proceeded against as other individuals, who have received money for the use of another, and his securities cannot be made liable." See also, *Bobo and Johnson v. Thompson*, 3 Stew. & Por. Rep. 385.

We might add to these citations, a notice of other cases in which their authority has been recognized, but it is deemed unnecessary to extend this opinion to greater length. The decisions cited, serve to show, that the payment of the amount of the execution to the sheriff, on the first day of the term to which it was returnable, *there being no levy previously*, cannot be regarded as the satisfaction of the execution, and that the plaintiff's remedy, is against the sheriff, by action, for money had and received, or against the original defendant, by issuing an *alias* execution.

Whether the sheriff and his surety could have been proceeded against, under the act of 1826, by a suggestion that the money could have been made on the execution by due diligence, is a question about which professional men might differ, and, as it is not presented in the case at bar, we leave it to be determined, when it shall arise in judgment.

The judgment of the Circuit Court must be affirmed.

FOSTER V. THE TRUSTEES OF THE ATHENÆUM.

1. The vendor of land, has a lien, in Equity, on the land sold for the unpaid purchase money, where he has not taken personal security for its payment, or a distinct collateral security as a pledge or mortgage.
 2. A surety paying a debt, stands in the place of the creditor, and is entitled to the benefit of all securities which the creditor had for the payment of his debt. But he can not assert a lien, in virtue of the instrument on which he is surety, as that becomes *functus officio*, by the payment of the debt secured by it.
 3. A surety of a vendee, who is compelled to pay the purchase money, has no lien in equity upon the land.
 4. If one purchase lands with his own money, in the name of another, a trust will, in general, result in favor of him who advances the money; but this presumption may be repelled, by the circumstances of the case, and is confined to those cases where the money is advanced at the time of the purchase.
 5. A number of gentlemen associated themselves together, to establish a female school, of which one W was the nominal head; and purchased a house for the contemplated school, of D, at the price of six thousand dollars; of which sum two thousand dollars was paid down, in the funds of the association, and the residue secured, to be paid by two bills of exchange, drawn by one L on W, and by him accepted. * The bills were payable to, and endorsed by one H to F, by him to R S F, and by him to D, the vendor of the land, who thereupon conveyed the premises to W. The company were afterwards incorporated, and the first bill which fell due, was paid with the funds of the corporation. Afterwards, W conveyed the property to the corporation, taking from four persons, (F being one) who describe themselves as trustees of the corporation, a covenant to indemnify him from liability on his acceptance of the last bill of exchange. F was sued on the bill as endorser, and compelled to pay it, and filed *his bill asserting a lien in Equity, on the house purchased from D, to the extent of the sum paid by him. in preference to certain creditors of the corporation, who had obtained from it a deed of trust on the house, with notice of his lien.
- Held:* First. That F was a mere surety for the corporation, and that the payment by him of a part of the purchase money, gave him no lien on the land. Second. That neither D nor W had any lien in Equity, on the land to which F could be subrogated,—admitting he had such a right—That D had no such lien, because he had taken the security of two persons for the payment of a part of the purchase money who were not members of the corporation: and that although W could not have been compelled to make title to the company until they had paid the purchase money for which he was bound, he had voluntarily relinquished this advantage, on being indemnified by F and others, and could not be permitted afterwards to assert it.

Error to the Chancery Court at Tuscaloosa.

THIS was a bill in Chancery, filed by the plaintiff in error, against the defendants in error.

The bill charges, that in the early part of the year, 1836, a Stock Company was formed in Tuscaloosa, for the purpose of establishing a female school; that Alva Woods, was President of the Board of Trustees of said association. That Woods, with their knowledge, and approbation, and for the purpose of obtaining a suitable building for the purposes of the institution, bought of John R. Drish, the premises, in the bill described, at the price of six thousand dollars. That two thousand dollars was paid down, and the residue of the purchase money was secured by two bills of exchange, drawn by one Joseph Lacy, on, and accepted by said Woods, payable to Chapman A. Hester, by him indorsed to complainant, by him to R. S. Foster, and by him to the vendor. The first bill, payable about a year after its date, and the latter for twenty-three hundred and twenty dollars, seven hundred and thirty days after date, negotiable and payable at the Branch Bank at Mobile.

The bill further charges that the trustees of the company, viz: Alva Woods, and others, were afterwards, and on the 23d of December, 1836, incorporated by the name and style of the "Trustees of the Alabama Female Athenæum," with the power to purchase and hold real estate, &c.; that said trustees organized themselves as a body politic, and under their charter established a female school, the present "Athenæum" in the premises so purchased as aforesaid, which is still occupied for that purpose. The bill charges that the purchase of the house was not made for the benefit of Woods, but for the company, and that the cash payment and the first of the bills of exchange were paid out of its funds. That on the first of March, 1837, Woods, who had previously received a deed from Drish, by deed of that date, conveyed the premises to the corporation. That no consideration whatever, was paid to said Woods, and that the trustees, complainant being one, executed to him an instrument in writing, to indemnify him against his acceptance of the last bill of exchange, as follows:

"STATE OF ALABAMA,
Tuscaloosa County.

Whereas, Alva Woods has become the acceptor of a bill of exchange for two thousand three hundred and twenty dollars, which is held by John R. Drish, due on the first day of May, 1838, which was given for the purchase of the premises where

the Alabama Female Athenæum now stands; and whereas his becoming acceptor on said bill, was for the benefit of said institution, and not for his own individual advantage; therefore, we the undersigned trustees of said institution, do hereby oblige ourselves to release the said Alva Woods from any liability on said bill of exchange whatever; and that we will make arrangements to take up said bill, so that said Woods shall in no wise be troubled or called on for its payment, and will indemnify him from any damage he might sustain on said bill; given under our hands and seals, this 5th day of May, 1837.

JAMES H. DE VOTIE, [Seal.]

C. A. HESTER, [Seal.]

JAMES FOSTER, [Seal.]

JOHN A. HODGES. [Seal.]

The bill charges, that said persons then were the trustees of the said corporation; that the true intent and meaning thereof was, that the purchase was made for the corporation, and not for, or on account of Woods; that the corporation was to pay the bill, and that the intention was, by the said agreement to bind the corporation; but that it did not do so: that it was protested for non payment; that complainant has been sued on it, and has paid it, and the complainant insists, that as this was a part of the purchase money of the premises, that he has in equity, a lien thereon, by way of equitable mortgage, &c.

The bill further states, that after the rendition of judgment against the complainant, the trustees made a deed of trust, by which the premises are conveyed to secure certain creditors of the corporation, and charges that the creditors knew of the said judgment, and that it was for the purchase money of the premises, and therefore cannot be considered *bona fide* mortgages, without notice, but that their lien must be postponed to that of complainant.

The trustees and creditors are made defendants to the bill.

The Chancellor dismissed the bill for want of equity, from which decree, this writ of error is prosecuted.

PECK, for plaintiff in error, argued that the plaintiff had, in equity, a lien on the premises, for the amount paid by him, it being part of the purchase money.

That if he had no such lien, that then he was entitled to the

benefit of the agreement entered into by De Votie, and others, to indemnify Woods, which can only be made available in equity.

In support of these propositions, he cited 1 Story's Eq. 479; 2 ib. § 1217 to 1240, and Note; 14 Vesey, jr. 159; 3 Mylne & Keene, 183; 6 Vesey, jr. 752; 15 ib. 329; 1 S. & L. 136; 2 & 3 Vesey & Beame, 309.

ELLIS, *contra*, maintained that Woods was the mere agent of the company, and that although the title in the first instance, was made to Woods, it was in fact, a sale to the company.

That such being the fact, the true question was, whether Drish retained a lien on the property, in equity, for the purchase money. This he insisted was not the case, because Drish took the independent security of third persons, which was a waiver of the equitable lien. He cited, 1 Mason, 192; 2 Wash. 141; 3 Bibb, 183; 4 ib. 13; 1 Paige, 20; 5 Mun. 297; 3 Johns. Chan. 57; 2 Story's Eq. § 1227; 5 Dana, 243.

He also insisted that as Woods retained no lien when he conveyed to the corporation, the covenant was personal; 7 Cranch, 306; 8 Johns. 249; 1 Bland. 105.

ORMOND, J.—The question to be determined in this case, is, what facts and circumstances will give the vendor of land a lien, in equity, for the purchase money unpaid.

It is well settled, both in England and the United States, that the vendor, in the absence of any agreement to the contrary, retains a lien on the land he has sold and conveyed for the unpaid purchase money, and that this lien will be enforced against a subsequent purchaser, with notice. It is also the law of both countries, that merely taking a bond or note for the purchase money, will be no waiver of the lien. How far the taking by the vendor of an independent security for the purchase money will have the effect of discharging the lien; is more a matter of doubt.

In *Nairns v. Prowse*, 6 Vesey, jr. 752, the Master of the Rolls held, that a mortgage of other property, or a pledge of stock, would be a substitution of the lien. But in *Grant v. Mills*, 2 Ves. & Beame, 308, Sir William Grant declared, "that the effect of the security of a third person properly so denominated, had never been determined," but he agreed that the opinion ex-

pressed by Lord Redesdale, in *Hughes v. Kearney*, 1 Scho. & Lefroy, that accepted bills of exchange were not sufficient to destroy the lien, was correct, and so decided. The same decision was made by the Vice Chancellor, in *Exparte*, Peake, 1 Madd. 196.

In the case of *Macreth v. Simmons*, 15 Vesey, jr. 329, Lord Eldon held, after an elaborate examination of all the cases, that no certain rule was deducible from them, but that each case must rest on its own circumstances, for the evidence of an intention on the part of the vendor, to part with his lien. His language is, "The more modern authorities upon this subject, have brought it to this inconvenient state; that the question is not a dry question upon the fact, whether a security was taken; but it depends upon the circumstances of each case, whether the Court is to infer, that the lien was intended to be reserved; or that credit was given, and exclusively given to the person from whom the other security was taken." See also, *Saunders v. Leslie*, 2 Ball & Beatie, 264.

On this side of the Atlantic, by a strong and decisive current of authorities, it appears to be settled, that where the vendor takes a distinct and independent security of property, or the responsibility of third persons, the lien on the land is waived. At an early period of our history, the rule is thus explicitly stated by President Pendleton, in *Cole v. Scott*, 2 Wash. Rep. 141. So also, in *Wilson and others v. Graham and others*, 5 Munford, 297, it was held, that where a vendor of land, executed a conveyance, and took from the purchaser a bond with surety, the equitable lien was gone, even while the land continued the property of the purchaser. To the same effect, are the cases of *Fish v. Howland and others*, 1 Paige, 20; *Cox v. Fenwick*, 3 Bibb, 183; and *Gilman v. Brown*, 1 Mason, 191; afterwards affirmed in the Supreme Court of the U. States, 4 Wheaton, 290.

The last cited case was discussed at great length by Mr. Justice Story, who examines the leading English cases, and successfully combats the opinions advanced by Lord Redesdale and Sir William Grant, that the receipt by the vendor of bills of exchange, accepted by a third person, was not a security, but merely a mode of payment, in cases where land was sold on a credit; but admits that the presumption of a waiver of the lien might not arise where the payment was to be in cash,

and bills of exchange afterwards taken, which prove unproductive.

It cannot therefore, we think, admit of serious doubt, that the law on this interesting subject ought to be considered as settled, at least in the United States; that where a vendor of land executes a conveyance, and takes personal collateral security, binding others as well as the vendee, as a note with surety; or a collateral security, as a pledge or mortgage, that no lien exists on the land itself. So far as the presumed lien on the land for the purchase money, rests for support, on the supposed intention of the parties, it may be confidently stated that in this State, it rarely, if ever exists, in the contemplation of the parties, where a conveyance of the land is made. A much more just and rational foundation for it, appears to be the principle of equity and natural justice, which forbids one to enjoy the property of another, without compensation, where it can be accomplished without injury to third persons.

We come now to consider the case made by the bill. A number of gentlemen associated themselves together to establish a female school, of which one Alva Woods was the nominal head; a purchase was made of a house for the contemplated school, of John R. Drish, at six thousand dollars, of which sum, two thousand dollars was paid down, in the funds of the company, and the residue secured, to be paid by two bills of exchange, falling due at different times, drawn by one Joseph Lacy, on Woods, and by him accepted. The bills were payable to, and indorsed by one Hester, to the complainant, by him to one Robert S. Foster, and by him to Drish, the vendor, who conveyed the premises to Woods. The company were afterwards incorporated, and the first bill which became due, was paid with the funds of the corporation. On the 1st May, 1837, Woods conveyed the property to the corporation, taking from four persons, the complainant being one, who describe themselves as trustees of the corporation, a covenant, to indemnify him from liability on his acceptance of the last bill of exchange. On this bill, the complainant was sued as indorser, and compelled to pay the amount due thereon, and now by his bill, asserts a lien on the house and lot purchased from Dr. Drish, to the extent of the amount paid by him, in preference to certain creditors who have obtained a deed of trust

from the corporation, on the premises, to secure their debts, with notice, as he alleges, of his lien.

This lien, the counsel for the plaintiff in error maintains, can be supported,

1. On the implied lien of Drish upon the house and lot, for the purchase money, to which right, he insists, the plaintiff, by the actual payment of the money, is substituted.

2. On the equity, which Woods had to retain the title until the bill he had accepted was paid, to which right, by the payment of the money, the complaint is substituted.

3. That the covenant entered into with Woods, guaranteeing the payment of his acceptance, by the corporation, will enure, in equity, to the complainant.

1. The sale made by Dr Drish to the company, was on time. One third part of the purchase money being paid down, and the residue secured by two bills of exchange, having about one and two years to run to maturity, and indorsed by two persons, Lacy and Robert S. Foster, who are not shown to have been members of the corporation, and it is admitted, they were not. It was, therefore, the security of a third person, in addition to that of the vendees, and falls expressly within the principle deduced from the cases in the former part of this opinion, and considered as the settled law of the U. States. This was, on the part of Drish, a waiver of the implied lien, and it will necessarily follow, that the complainant could not, by the payment of the purchase money, be substituted to a lien, which did not exist in the vendor, if it were conceded that the complainant occupied an attitude which, if the lien existed, would enable him to exert it.

2. Can Woods be considered a vendor, in that sense of the term which will draw after it the consequences flowing from that relation, as it respects the *lien* for the purchase money unpaid? The facts show conclusively, that the title was made to him in the first instance, as a *mere trustee*. The company for whose use it was bought, contemplated obtaining an act of incorporation, but was then a mere association of gentlemen, of which Woods, being the nominal head, the title was taken in his name, but the cash payment made at the time, was with the funds of the company. The bill sedulously guards against any other conclusion. After stating facts, from which this re-

sult would follow, it expressly charges "that said purchase was made for the use and benefit of the said corporation, and not for the use and benefit of Woods." It is true, that Woods, by accepting the two bills of exchange, had become responsible for the payment of two thirds of the purchase money, and if he had been compelled to pay it, and had retained the title, a Court of Chancery would not have compelled him to part with the title until he was refunded the money he had paid. But this state of things never existed. The first bill was paid by the corporation, and before the maturity of the last bill, Woods voluntarily conveyed the property to the corporation, receiving at the time, from the complainant and three other persons, a covenant, to indemnify him against his acceptance of the bill yet unpaid. The parties to this covenant, style themselves the trustees of the corporation, and it is alleged in the bill, that the parties to it intended to bind the corporation to indemnify Woods; but no proposition can be plainer than that this is the personal covenant of these parties, and that they are personally responsible upon it. Now, if we consider Woods, as the plaintiff's counsel contends, not a mere trustee, as in fact he was, but the vendor of the land, then, upon the principles laid down in the preceding part of this opinion, his having taken the personal guaranty of the complainant and others, would be a waiver of the implied lien, as that covenant was an independent security beyond, and in addition to the liability of the corporation.

It is also supposed, that as the money of the complainant went in part to pay for the land, that a trust results in his favor to the extent of the payment. It is true, that if one purchase lands with his own money, in the name of another, a trust will, in general, result to him, who advances the money. *Boyd v. McLean*, 1 Johns. C. 582; *Sug. on Vend.* 414; 2 *Story's Eq.* 445. But this doctrine is confined to cases where the money is advanced at the time of the purchase. In the language of *Chan. Kent*, in *Bottsford v. Burr*, 2 Johns. C. 409, "the trust arises out of the circumstance, that the monies of the real and not the nominal purchaser, formed at the *time*, the consideration of the purchase, and became converted into the land." It has no application, when the money, either in whole or in part, is paid by one as the surety of the vendee. The whole foundation of the rule ceases in such a case, which Mr

Justice Story considers to be "the natural presumption in the absence of all rebutting circumstances, that he who supplies the money, means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement for other collateral purposes." See page last cited. In the case of *McKay v. Green*, 3 Johns. C. 56, Chan. Kent says, "the notion that the plaintiff had an equitable lien on the land, because the note he indorsed was applied in part payment of the purchase money, is entirely without foundation."

Now, what are the facts. On the most favorable hypothesis for the complainant—the one assumed by his counsel—Woods sold the land to the corporation, the money to be paid at a future time to Drish, the first vendor, by the corporation, the complainant, and three other persons, entering into a covenant with him, to save him harmless, from his liability to Drish, for the purchase money unpaid; or in other words, these persons became the sureties of the corporation, for the debt to be paid to Drish, and for which, on his acceptance, Woods was primarily responsible. No ingenuity can avoid the conclusion, that the condition of the complainant was, that of a mere surety of the corporation to Woods, and no authority can be found, that the payment of the money, under such circumstances, creates a lien on the land, for the payment of which, it was made.

With no more propriety can the doctrine of substitution be invoked, in aid of the complainant. That rule is, that a surety paying a debt, shall stand in the place of the creditor, and is entitled to the benefit of all securities which the creditor had for the payment of his debt, from the principal debtor; in a word, he is subrogated to all the rights of the creditor. *Craythorne v. Swinburne*, 14 Versey Jr. 160; *Copis v. Middleton*, 1 Turn. & Russ. 224; *Hodgson v. Shaw*, 3 Mylne & Keene, 183. The surety, however, cannot avail himself of the instrument on which he is a surety, by its payment. By payment it is discharged—it ceases to exist, and the payment will not, even in equity, be considered an assignment—the surety merely becomes the creditor of his principal, to the amount paid for him. That this is the settled law, see the elaborate opinions of Lord Eldon, in the case of *Copis v. Middleton*, and of Lord Brougham, in the case of *Hodgson v. Shaw*, previously cited.

The security which the complainant seeks the benefit of, or through which it is supposed his equity may be traced, or derived, by this doctrine of substitution, is the covenant entered into by the complainant and others, to indemnify Woods against his acceptance. But this became *functus officio*, the moment the debt was paid, either by the corporation or by any party to it, and cannot be again resuscitated. The complainant, by paying the debt, has done no more than he had in effect covenanted to do, which will be most obvious, if it be considered that, if he having, as indorser, been compelled to pay the amount of the bill, should sue Woods on his acceptance as a primary liability, this covenant would be a complete answer to the action. This being the case, the authorities above cited, determine beyond doubt, that even if Woods could entitle himself to an equitable lien, through the medium of this covenant, the complainant cannot, because it no longer exists as a security.

There is still another view of this subject, quite as satisfactory perhaps as any yet taken.

It has been already stated as an admitted principle, that if Woods had been compelled to pay his acceptance, before he conveyed the title to the corporation—he could not have been compelled to part with the title until he was refunded the purchase money—not so much on the ground of any specific lien, as because a Court of chancery would not deprive him, a mere surety, of an advantage fairly obtained. Let it now be admitted, that the complainant and the other parties to the bill, who were also sureties, had a right to insist that the title, thus held by Woods, was for the benefit of all the sureties, or of any one who was compelled to pay the debt. Yet this was an advantage which they surely had a right to waive the benefit of. Woods, it appears, insisted on the advantage he had obtained, and the complainant, with the other trustees, to induce him to abandon it, and convey the title at once to the corporation, covenanted to indemnify him against loss on his suretyship. If any thing can be clearer than that, after this voluntary relinquishment, Woods could not assert his *lien*, it must be that those who induced him to relinquish it, cannot ask this Court to subrogate them to a right relinquished at their instance.

It appears from this examination, that there was no equity in the bill, so far as it asserted a specific lien against the creditors

under the trust deed, but if the money paid by the complainant for the corporation, was paid at the instance of the corporators, or of those intrusted with the management of its concerns, the complainant is entitled to relief against the corporation, and for that purpose, the bill should have been retained. The decree of the chancellor, therefore, is affirmed, so far as it dismisses the bill against B. F. Porter, and the creditors in the trust deed, and reversed, so far as it relates to the trustees of the corporation, and remanded for further proceedings.

MANN v. BUFORD.

1. An attorney who has money belonging to a defendant in execution, is subject to be garnisheed, although the money in his hands has been collected by suit.
2. When the answer of a garnishee states facts, from which an indebtedness to the defendant in the execution must be inferred, and that for a specific sum, a judgment may be rendered against him, although his answer contains no distinct admission of indebtedness.

Writ of error to the Circuit Court of Barbour county.

THE defendant was garnisheed as a debtor of one Robert F. Lanier, against whom the plaintiff had previously obtained a judgment, as there is reason to infer from the record; but this judgment is not set out. The garnishee was served with process, appeared and answered as follows: That he, or one Hansford, his partner in the practice of law, since deceased, received for collection, (from whom he knew not, but supposes it was from the defendant in execution, as the note was sued in his name) one note, made by William J. Grimes, payable to J. W. Mann, due December 25th 1835, for four hundred dollars, with a credit thereon of two hundred dollars, dated 11th April, 1836. Suit was brought on the said note in the Circuit Court, and judgment thereon for the sum of two hundred and seventeen dollars and fifty cents, was obtained at the September term, 1836. In April, 1837, the garnishee, as attorney, collected on said

judgment of debt and interest, the sum of two hundred and twenty-two 78-100 dollars; out of which the garnishee claims to retain eleven 13-100 dollars for commissions, and so in respect of the said collection garnishee owes the said Lanier, (if said note, in fact, was received of him for collection, and which garnishee does not know certainly, and only infers from the fact of suit being brought in his name) the balance, to wit, two hundred and eleven 65-100 dollars, which was collected and still held in his, garnishee's said capacity of an attorney of this Court. Besides this, garnishee never owed said defendant in execution, &c.

On this answer, the Circuit Court rendered judgment that the garnishee should go hence and be discharged. The reason for this judgment is stated to be, that attorneys are not liable for money collected by them in that capacity.

To reverse this judgment, the plaintiff prosecutes his writ of error, and joins both the garnishee and the defendant in execution, as defendants.

HARRIS, for the plaintiff in error.

BUFORD, *pro se*.

GOLDTHWAITE, J.—1. An attorney is not exempt from garnishee process, in consequence of the connexion which exists between him and the courts of law. He is not an officer of the law, although the courts frequently exercise a summary control over him, but this is only for the advancement of justice, by compelling the performance of well known duties to his clients, who are suitors in the courts. For every other purpose, he is the mere agent for his client and when he also becomes his debtor, he may be garnisheed, as any other person.

2. It is supposed, in the argument which the garnishee has submitted, that the admission of indebtedness, contained in this answer, is not sufficiently distinct to authorise any judgment. It is certainly settled by repeated decisions of this Court, that the answer must contain an admission of indebtedness. *Smith v. Chapman*, 6 Porter, 365, and cases there cited. Here, there is such an admission, not, it is true, in so many words, that he owes the defendant in execution so much, but no other conclusion can arise, from the facts which are stated, and if the

same facts were proved by the defendant in execution in a direct suit against the attorney, a judgment for the specified sum, would be the necessary consequence. It is precisely the same principle which was decided by us in the case of *Baker v. Moody*, 1 Ala. Rep. N. S. 315.

We have no hesitation in reversing the judgment, and should render it here against the garnishee, for the proper sum if the judgment against the defendant, in execution, was shewn.

As the record does not set out this judgment, the cause must be remanded for further proceedings.

We remark that the writ of error is irregular in joining the defendant in execution, with the garnishee, but as no action is requested, we presume, conformably to our recent course of practice, that the defect is waived.

PORTER V. COTNEY AND COTNEY.

1. If a witness believe in the existence of a God, who will punish falsehood, even in this life, he is a competent witness, although he may not believe in a future state of rewards and punishments.
2. Two persons were joined as defendants, who pleaded the *general issue*; and thereupon a verdict was returned as follows: "We, the jury, find the issue in favor of the defendant"—*Held*, that the reasonable intendment is, that *defendant* was unintentionally used for *defendants*, and the verdict is decisive of the case.

THIS was an action of *assumpsit*, brought in the Circuit Court of Tallapoosa, for the recovery of a sum of money, due by promissory note. The cause was tried on the plea of *non-assumpsit*. On the trial, the plaintiff inquired of a witness, introduced by defendant, whether he believed in a future state of rewards and punishments, but the witness objected to answering the question, and his objection was sustained; and thereupon the plaintiff excepted. The jury returned a verdict as follows: "We, the jury, find the issue in favor of the defendant;" on which the Court rendered its judgment, "that the

defendant recover of the plaintiff, the costs in this behalf expended," &c.

To revise the judgement of the Circuit Court, the plaintiff has brought his case here by writ of error.

T. CLAY, for the plaintiff in error.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—In *Blocker v. Burruss*, 2 Ala. Rep. N. S., it was decided, that it is not essential to the competency of a witness, that he should believe in a future state of rewards and punishments; but it is enough if he believe in the existence of a God, who will punish falsehood, even in this life. This being the law, the question proposed to the witness, was one, however answered, from which no consequences would result to affect the rights of the parties; and the refusal of the Court to compel the witness to answer it, was entirely proper.

We do not understand that the jury intended to find a verdict in favor of one defendant, leaving the case undisposed of as to the other. Had they intended to distinguish between them, and relieve one from liability while they charged the other, their verdict would doubtless have been expressed in other terms. The correct interpretation of the verdict is, that the plaintiff is not entitled to recover: the plea interposed by both defendants being sustained. We must intend, under the circumstances of this case, that the verdict and judgment are unintentionally in the singular number; that "defendant" was used for "defendants." Such, in effect, has heretofore been the decision of this Court.

The judgment of the Circuit Court is affirmed.

GILES V. WILLIAMS, USE, &c.

1. A plea that a note or bond was given without any consideration, is good under our statute.
2. A plea impeaching the consideration of a bond given for the purchase of land, which does not show either that the contract has been rescinded, or that the purchaser has lost the possession of the land, is bad.
3. A plea alledging that a "bond was obtained by fraud, covin and misrepresentation is bad. Even in this State, where the consideration of a bond may be impeached, the facts which constitute the fraud must be stated.

Error to the Circuit Court of Tallapoosa county.

THIS was an action of debt, on a sealed instrument, for the payment of one hundred and thirty dollars, brought in the Court below, by the defendant, against the plaintiff in error. To a declaration in the usual form, the defendant pleaded specially:

1. That the bond sued on in this action, was given without any consideration, to wit; at the county aforesaid, wherefore, &c.

2. That the consideration for which the bond sued on, was given, has wholly failed, in this, that the said bond was given in consideration of the south half, north-west quarter, section 2, township twenty-one, range 21; and the north-east quarter of the south-west quarter of the same section, township and range, in the county aforesaid; that at the time said note was executed, that no title was made to said defendant; that said plaintiff did not covenant for a good title, with said defendant, and that no title has yet been made, nor is it in the power of the plaintiff to make one, and this he is ready to verify, &c.

3. That the bond in the declaration mentioned, was obtained by fraud, covin and misrepresentation, that is to say by the said plaintiff, to wit: at the county aforesaid, and this, &c.

To these pleas, the plaintiff demurred, which were sustained by the Court, and the defendant declining to plead over, judgment was rendered for the plaintiff against the defendant and another, who was not taken in the writ, and as to whom the suit had previously been discontinued.

At the succeeding term of the Court, this judgment was amended by entering up the proper judgment, *nunc pro tunc*.

From this judgment, the defendant prosecutes this writ of error, and now assigns for error :

1. The Court erred in sustaining the demurrers to the pleas.
2. In entering up judgment, *nunc pro tunc*.

T. CLAY, for plaintiff in error.

PRYOR, contra.

ORMOND, J.—The questions of law in this case, are presented on the pleadings.

1. The first plea is, that the bond sued on, was made without any consideration whatever. This form of pleading grows out of our statute, which makes every writing, whether under seal or not, evidence of the debt, or the duty for which it was given, and permits the defendant, by plea, to impeach the consideration of a bond, in the same manner as if it had not been sealed: Aikin's Dig. 283. If a note or bond then, is executed without any consideration, the plea must, of necessity, be in the negative; it is not possible to plead or state that affirmatively, which has no existence. If in truth, there was a consideration, the plaintiff in his replication may set it out upon which the defendant must take issue. The demurrer to this plea, therefore, should not have been sustained.

2. The second plea, alleges that the consideration for which the bond was given, has wholly failed in this, that it was given for a piece of land; that no title or covenant for title, was executed at the time; that no title has yet been made, nor is it in the power of the plaintiff to make one. This plea cannot be supported. It impliedly, at least, admits that the contract for the sale of the land, is not rescinded, and he therefore has the benefit of the contract on his part, by the possession of the land. It is the settled law of this Court, that a vendee in possession of land, cannot defend himself, in an action at law, for the purchase money, while he retains the possession. The only exception hitherto admitted to this rule, is, that a vendee may, under certain circumstances, apply to a Court of Chancery, to rescind the contract, before eviction, and without abandonment of the possession. *Young v. Harris*, 2 Ala. Rep. 108.

3. The third plea, which alleges that the bond was obtained by "fraud, covin and misrepresentation," is clearly bad. It is a well settled principle, at common law, that a fraud, which will vacate a deed, in a Court of law, must be a fraud which relates to the *execution* of the instrument; as for example, that it was falsely read to the party. This question was discussed at large by this Court, in the case of *Swift v. Fitzhugh*, 9 Por. 63, and again in *Mordecai and Wanroy v. Tankeisly*, 1 Ala. Rep.; and see *Taylor v. King*, 6 Munford, 366.

The counsel for the plaintiff in error, has referred us to a precedent in the 2 vol. Chitty's Pleadings, page 495, where a plea, that a deed was obtained by fraudulent misrepresentations, is given. But it is denied that this precedent is supported by any authority;—see the case cited from 6 Munford, and *Dow v. Mansell*, 13 Johns. Rep. 430, and the case of *Wythe v. Macklin*, 2 Rand. Rep. 426. We have also been referred to the case of *Pemberton v. Staples*, 6 Mo. Rep. 59, where a plea of fraud, of this general character, was admitted on the authority of Chitty. The opinion [is short and unsatisfactory—the Court admitting, that there was a conflict of authority, but that it had not access to them, to ascertain the extent of the disagreement.

When this question was presented to this Court, previously, in the cases cited, it was as a question of evidence, and had reference not to the consideration, but to the validity of the deed. Considered as a question of pleading under our statute, there can be no doubt, that the consideration of a deed may be impeached, by alleging such facts as would, in law, amount to a fraud. The objection to this plea, is not that the consideration of a bond may not be impeached by an allegation of fraud, but that instead of stating the facts, which constituted the fraud, the pleader has stated a conclusion from facts, which are not disclosed, and the demurrer to it, was therefore, properly sustained.

For the error of the Court, in sustaining the demurrer to the first plea, the judgment must be reversed, and the cause remanded.

MOORE & Co. v. SAMPLE.

1. A sheriff is justified in levying an execution against the goods of one partner, on the goods belonging to the firm, and in an action of trespass against him by the firm, evidence is not admissible to prove that the partnership goods were not more than sufficient to satisfy their debts.
2. When the sheriff levies on the interest of one partner, he is justified in taking exclusive possession of the goods of the firm, until the aid of a court of equity is successfully invoked.

Writ of error to the Circuit Court of Autauga county.

ACTION of trespass, for breaking the close and carrying away the goods of the plaintiffs.

At the trial, it appeared that the defendant, acting as sheriff of Autauga county, levied an execution, issued against Edward H. Moore, on a stock of goods, which were the property of said Moore, Samuel H. Moore, John H. Moore, and Turner H. Moore, the plaintiffs, who were partners, and ejected them therefrom, for about twelve days, after which time he returned the goods to the possession of the plaintiffs. The plaintiffs offered evidence conducing to prove, that the stock of goods was not more than sufficient to satisfy the partnership debts, contracted by the firm, in their purchase of the goods. This evidence was excluded by the Court; to which the plaintiffs excepted. They also requested the Court to charge the jury, that a sheriff, holding an execution against an individual member of a firm, cannot levy upon the partnership property, exclude the other partners from the possession, and proceed to sell, under said execution. This was refused; and the jury was instructed, that a sheriff holding an execution against one member of a firm, may levy upon the partnership goods, take them into his exclusive possession, and sell the individual interest of said member of the firm. This was also excepted to by the plaintiffs, who now prosecute this writ of error, to reverse the judgment rendered in favor of the defendant.

The errors are assigned upon the questions decided by the Circuit Court.

HILLIARD, for the plaintiffs in error—cited, *Pierce & Baldwin v. Pass & Co.* 1 Porter, 232; 3 Peters' Dig. 164; 1 Gall, 367; Peters' C. C. 460; 8 Pet. 271; 2 Sumner, 409; 6 Mass. 271.

HAYNE, *contra*, relied on *Winston v. Ewing*, 1 Ala. Rep. N. S. 129.

GOLDTHWAITE, J.—The quantity of interest which each partner has in the goods of the partnership, may oftentimes be a question very difficult to decide, but it is certainly clear, from authority, that this interest is the subject of levy and sale under an execution. We have heretofore had occasion to examine the cases connected with this principle, although it has not been directly presented for decision, in any case before us. Most of them are collected and stated in the case of *Winston v. Ewing*, 1 Ala. Rep. N. S. 129, and we shall consider our duty as discharged, by giving some of the reasons which led our minds to this conclusion.

Each partner has an interest in his own right, coupled with a possession, and the conjunction of these, is sufficient in every case, to authorise a sheriff in making a levy. When the levy is made, if the rights or interests of other partners are so commingled with those of him whose estate is seized, that injury to them will probably result from further action by the sheriff; a case is presented for equitable interposition. If this is not successfully invoked, the sheriff must, of course, proceed to sell. We are not now required to declare what right the purchaser may acquire under such a sale, but unless it can be made, the singular anomaly would exist, of a possession held by the defendant, coupled with an interest in his own right, which cannot be reached by execution at law. It is needless to say, if such a condition of property was permitted by law, it would lead undoubtedly to covin and fraud.

Hence, we conclude, that the evidence offered, was properly rejected.

2. The charge of the Court, seems also to be free from error. The sheriff, is bound at his peril, to answer for the interest which the defendant has in the goods which are levied on, and if not permitted to have exclusive possession, they might be eloiigned without his fault. It is the misfortune of those whose interests are so connected with those of a defendant in

execution, that their respective estates cannot be severed. But this condition of things, certainly ought not to cause injury, either to the plaintiff or the sheriff. If there is any fault, it is with the partners, who have so connected their estates, that justice cannot be done to others, without injury to themselves. *Morley v. Stromborn*, 3 B. & P. 254; *Parker v. Pistor*, ib. 288; *Chapman v. Koops*, ib. 288; *Heyden v. Heyden*, 1 Salk. 392; *Bechurst v. Clinkard*, 1 Show. 169; *Jacky v. Butler*, 2 Ld. Raym. 871.

The judgment is affirmed.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT
DECATUR V. PEIRCE.

1. Where a note or bill is dated at a particular place, it is not sufficient, in order to charge an indorser, to send him a notice by mail, to that place, if he lives nearer and is in the habit of receiving his letters at another post office; unless the holder has used reasonable diligence to ascertain his address.
2. The holder of paper is supposed to employ proper diligence to ascertain the indorser's address, if he makes enquiry of different persons living at the place where the paper is payable, whom he may suppose the most likely to give the desired information; and if such inquiries are unavailing, it will be sufficient if he send by mail, a notice addressed to the indorser at the place where the paper is dated.

Writ of error to the County Court of Morgan.

THIS was a proceeding by notice and motion, at the suit of the plaintiff in error, to recover of the defendant, the amount of a promissory note of which he was the indorser. The cause was tried on the plea of *non-assumpsit*. On the trial, the plaintiff excepted to the ruling of the Court.

From the bill of exceptions, it appears, that the plaintiff having offered the notarial protest, setting forth a demand, protest and notice of non-payment of the note in suit, the defendant proved that he resided nearer the post-offices at *Red Hill* and *Warrenton*, in the county of Marshall, than he did to the post-office, to which the notice was sent; and that he had been

known to receive letters at the former office. The plaintiff then offered to prove by the notary, protesting the note, that before sending the notice of protest to the defendant, he made inquiry, and used diligence to discover the place of residence and proper post-office of the defendant, and inquired of the officers of the Branch Bank, and other persons residing in and about the town, in which the Bank was located, who were likely to know at what place he resided; all of whom were unable to give him the desired information; and thereupon, he addressed a notice to the defendant, directed to "Marshall county, Ala."—the note appearing on its face, to have been there made. To the admissibility of this evidence, the defendant objected; his objection being sustained by the Court, the plaintiff excepted.

McCLUNG, for the plaintiff in error. The question presented by the bill of exceptions, has not been considered by this Court, in any case heretofore decided. In *Foard v. Johnson*, 2 Ala. Rep. 565, it was determined that a notice sent by mail, to the drawer or indorser at the place where a bill was dated, was not sufficient, where it appeared that he resided nearer or received his letters at another post-office; unless the holder after having used due diligence, was unable to ascertain his place of residence. But in that case, the Court do not undertake to define what is due diligence, and it is insisted, that the facts proposed to be proved by the plaintiff, constitute a sufficient excuse for the failure, regularly to notify the defendant of the non-payment of the note.

HOPKINS, for the defendant. If the residence of the defendant was unknown to the holder of the note at the time of its maturity, due diligence should have been used to ascertain it, and notice of non-payment given him, immediately upon its being ascertained. 15 Eng. C. L. Rep. 242 2, Camp. Rep. 462; 3 *ibid.* 262; Chitty on bills, 9 Am. ed. 486, 7, 524, 5 and Notes: 3 Conn. Rep. 101; 4 Wend. Rep. 328, 398; 13 Johns. Rep. 432; 16 *ib.* 218; 3 Greenl. Rep. 233; 2 Ala. Rep. 565.

If the holder rely upon a misdirected notice, he must show that the misdirection was attributable to the defendant. Chitty on bills, 488; 11 East Rep. 114.

Where the holder of paper is ignorant of the indorser's residence, he should make inquiry of the previous parties to the

bill, if their residence is known. If the information cannot be obtained from them, then resort must be had to other persons: Chitty on Bills, 9 Am. ed. 487 '8 and Note; 3 Greenl. Rep. 233; 15 Eng. C. L. Rep. 242; 3 Camp. Rep. 262; 2 Ala. Rep. 565.

COLLIER, C. J.—In Foard v. Johnson, 2 Ala. Rep. 565, the bill was drawn and dated at Mobile, but the drawer, at the time of the drawing and maturity of the same, resided in the county of Sumter. The bill not being paid, it was protested for non-payment, and notice thereof deposited in the Post Office at Mobile, although the drawer resided much nearer other post offices: it was held, that the place where the bill was dated could not be regarded as such evidence of the drawer's residence as to relieve the holder from the necessity of making inquiry on the subject; and that if ignorant of it, he should have made diligent inquiry to ascertain it, and when ascertained, there have sent the notice. This decision leaves it an open question, whether the holder of paper, in order to free himself from the imputation of laches, in giving notice to the drawer or endorser, whose residence is unknown, should resort to the other parties to the paper for information. This measure of diligence has, in several cases, been holden to be necessary. Thus, in Beveridge v. Burgis, 3 Camp. Rep. 262, the excuse alleged for the omission to give notice was, that the plaintiff, an indorsee was ignorant of the address of the defendant, and indorser, and that he had made inquiry upon the subject at a house in the place where the bill was made payable by the acceptor. Lord Ellenborough said, "ignorance of the indorsers residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. How should it be expected, that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the *directory*. Ignorance may excuse, but reasonable diligence must be used to obtain knowledge." See also Hill v. Vannell, 3 Greenl. Rep. 233. These are the only oases we have seen, in which so strict a requisition has been made of the holder of paper, where he is ignorant of the residence of the draw-

er or indorser; and we are satisfied that their recognition as authority here, would be productive of great inconvenience. Our population is so sparse, and the means of communication in some parts of the country, so difficult and tardy, as to impose not only an undue burden, but cause great delay in the collection of debts, if the holder should be required to resort to the other parties to a bill or note, to learn where the drawer, or a particular indorser might be reached with a notice. Not only assignable, but negotiable paper has become very common in the ordinary business transactions of society, and the true policy is not to interpose difficulties to its collection, but rather give increased facilities to the creditor, so far as is consistent with the rights of the debtor. Such seems to be the tendency of judicial decision.

In *Chapman v. Lipscombe and Powell*, 1 Johns. Rep. 294, it appears that the defendants, residing in Petersburg in Virginia, drew a bill, dated at New York, on persons residing there, who accepted it. When the bill became due, payment was demanded of the acceptors, which was refused. The clerk of the notary, who had protested it, testified that he had made diligent inquiry after the defendants, at the Banks in New York, and elsewhere, and the information was, that they resided at Norfolk, in Virginia,—that on the day of its protest, or the day after, he put two notices in the post office of the city of New York, one directed to the defendants at New York, the other, to the defendants at Norfolk, informing them of the protest for non-payment. The Court held, that due notice of the dishonor was given: "The bill was drawn and dated at New York, and there is no evidence that the plaintiff knew that the defendants resided at Petersburg; he inquired at the Banks and elsewhere, and being informed that the drawers resided at Norfolk, he sent a notice by post to them, and another addressed to them at New York; this is sufficient, and all that ought to be required of him. He has used due diligence." See also *Reid v. Payne*, 16 Johns. Rep. 218; *Cuyler v. Nellis*, 4 Wend. Rep. 398; *Bank of Utica v. Phillips*, 3 ib. 408; *Wells v. Whitehead*, 15 Wend. Rep. 527; *Bank of Utica v. Bender*, 21 Wend. Rep. 643.

In the *Hartford Bank v. Stedman & Gordon*, 3 Conn. Rep. 489, it appears that the notary, instead of making inquiry about

the indorser's address, sent a notice directed to him, inclosed in a letter to a person who knew where he resided, requesting that the direction might be completed, and the notice forwarded.—The Court held, that although the holder of paper is bound to use due diligence to ascertain the indorser's residence, yet in the case before them, "the omission of the notary to waste time in making inquiry, and sending the notice to a person acquainted with the indorser's place of residence, that the deficiency in the direction might be supplied, satisfied the rule of law, requiring reasonable diligence." To *S. P. Shepard v. Hall*, 1 Conn. Rep. 329; *Colt v. Noble*, 5 Mass. Rep. 167; *Utica Bank v. Smith*, 18 John. Rep. 240.

The strictness of the rules of law which once obtained, in respect to the notice necessary to charge a drawer or indorser, has been greatly relaxed, and instead of requiring of the holder of paper the employment of all possible diligence, it is enough if he has used such diligence as is reasonable. To show that such is the law, many other cases might be cited, but we will content ourselves with a single additional citation to the point. In *Williams v. The Bank of the United States*, 2 Peters' Rep. 96, it was shown, that the notary called at the house of the indorser, which was shut up, and the door locked, and was informed that he and his family had left town on a visit; but for what length of time he did not know, nor did he inquire. He used no other diligence to ascertain whither the indorser had gone, or whether he had left an agent in town. He, however, left a notice at the house of the next neighbor, with a request that it might be delivered to the indorser when he returned. *Held*, that this was sufficient diligence to charge the indorser.

Our conclusion, from a review of the authorities, as well as from the reason of the thing is, that the holder of a negotiable paper, if ignorant of the residence of the indorser, is not bound to go abroad to inquire of the other parties to it; and that he satisfies the rule, requiring the employment of reasonable diligence, if he makes inquiry of different persons, living at the place where the paper is payable, whom he may suppose most likely to impart the desired information. In the case before us, it is shown, that the notary inquired of the officers of the Bank at which the note was payable, and of other persons residing in and about the town where the Bank was located, for the

defendant's address, before he mailed the notice directed to him, at the county in which the note was dated. This, in our opinion, was quite sufficient to entitle the plaintiff to recover, whether or not the notice reached the defendant as soon as it would if other steps had been taken. The consequence is, the instruction to the jury was erroneous, and the judgment must be reversed, and the cause remanded.

THE TRUSTEES OF THE GAINESVILLE FEMALE ACADEMY V. BROWN.

1. Where the instrument sued on is executed by one, who professes to be an agent, the plaintiff is not required, under our statute, to prove the authority of the agent, unless that fact is put in issue by a plea, verified by affidavit. The statute applies as well to corporations as to individuals.
2. The statute, making the instrument itself, unless questioned by plea, evidence of the debt or duty for which it was given, there was no necessity on the part of the plaintiff, in the absence of such plea, to prove the consideration, or that the contract was within the scope of the legitimate objects of the corporation.

Error to the County Court of Sumter.

THIS action was commenced in the Court below, by the defendant in error against the plaintiff, on an order drawn by one Stephen Allen, on the corporation, in favor of the defendant in error, which was thus accepted, "accepted, G. P. Mobley, treasurer of the Gainesville Female Academy." The jury found a verdict for the plaintiff below. From a bill of exceptions taken at the trial, it appears, that the plaintiff read to the jury the order and the acceptance, and the act of incorporation, which being all the evidence offered, the Court charged the jury.

1. That the acceptance sued upon, not having been denied by plea, verified by oath, it was not necessary for the plaintiffs to prove that the acceptance was signed by Mobley, or that he was, at the time of making it, either treasurer or other agent of defendant, or had any authority to act in its behalf.

2. That no plea of *non est factum* having been interposed, the defendant could not show any want of authority in Mobley to make the acceptance.

3. That the charter of the defendant empowered it, by themselves or agent, to make such an acceptance, and that it was not necessary for the plaintiff to prove what the acceptance was given for, or that it came within the legitimate business of the defendant as a corporation, otherwise than by its production.

The defendant moved the Court to charge the jury, that unless they believed, from the evidence, that at the time of making it, the acceptor was the treasurer, they must find for the defendant; and that his mere signature on the face of the bill, was not sufficient evidence of that fact; and further, that unless they were satisfied, by proof, apart from the paper itself, that Mobley was the treasurer, and as such, authorized to make the acceptance on behalf, and as the agent of the corporation, they must find for the defendant.

2. That it not being averred in the declaration, that the acceptor, Mobley, was agent of defendant, the plaintiff, to entitle himself to recover, was bound to prove such agency; which instructions the Court refused to give, and the defendant excepted, as well to those given, as to those which the Court refused to give. And now assigns the instructions given, and the refusal to give, for error in this Court.

REAVIS, for plaintiff in error.

SCOTT, contra, cited Minor's Rep. 105, 179; 1 Stewart, 479; 7 Porter, 505; 9 ib. 523; ib. 322; 1 Ala. Rep. 291; 1 Cowen's Rep. 513; Bailey on bills, 68.

ORMOND, J.—The cases referred to by the counsel for the defendant in error, satisfactorily establish the position, that our statute, requiring the execution of any instrument sued on, to be questioned by a plea, verified by affidavit, applies to those cases where the instrument has been executed by one professing to be the agent of the principal. The only doubt which could arise, would be, whether the act applied to a corporation, but we can see no reason for thus restraining it. The fact, whether the corporation has authorised an agent to bind

it, must be as well known to those who manage its concerns, as in the case of an individual, and such persons, or any of them, would be quite as competent to make the oath the statute requires. In *Martin v. Dortch*, 1 Stewart, 479, it was held, that an adm'r was competent to make the oath on the part of his intestate, and would only be required to swear to the best of his knowledge and belief. That case does not, in principle, vary from the present, and has always been acquiesced in, as a sound exposition of the statute.

There was no necessity cast on the plaintiff, to prove the authority of the agent, Mobley—his right to bind the corporation, being admitted, by the failure to interpose the oath required by the statute.

Nor was it necessary to prove the consideration; the statute makes the instrument itself, unless questioned by plea, evidence of the debt or duty for which it was given; and if the contract was not binding on the corporation, because not within the scope of its legitimate purposes, as designed in its creation, such fact should have been shown by plea; the failure to interpose which, is at least *prima facie* evidence, that the consideration on which it was given, was lawful. See the case of *Lazarus and Shearer*, at the last term.

There was no necessity to aver in the declaration, that the acceptor of the order was the agent of the corporation—the act of the agent is the act of the principal.

Let the judgment be affirmed.

GRAY V. APPERSON, USE, &c.

1. The City court of Wetumpka is a court of limited jurisdiction, and has no authority to issue a *certiorari* to a justice of the peace.

Writ of error to the Circuit Court of Autauga county.

A suit was instituted before a justice of the peace of Autau-

ga county, against S. S. Gray, by Apperson, for the use of Berkley. The justice gave judgment for the plaintiff, and the defendant afterwards applied to the judge of the City Court of Wetumpka, for a writ of *certiorari*, to remove the said cause into his Court. The writ was issued, and when returned, Apperson moved to quash it on the ground that the Court had no jurisdiction. The writ was quashed for this cause, and thereupon Gray sued out a writ of error to the Circuit Court, which affirmed the judgment of the City Court, repudiating jurisdiction of the cause. He now prosecutes this writ of error to reverse the judgment of the Circuit Court.

Pore, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The only question determined in the City and Circuit Courts was, that the former has no authority given by law to issue writs of *certiorari* to review the judgments of a justice of the peace.

The act which creates the City Court of Wetumpka, was passed in 1839, and so much of the enactment as is essential to the understanding of the question to be decided, will be found on the 17, 18, 22 and 23 sections.

By the 17th section, a Court is established, whose jurisdiction within the city, is to be the same, and concurrent with that of the several County and Circuit Courts, with the exception of the powers appertaining to a Court of probate and ordinary. The Judge of the Court is to have the same powers, so far as applicable, as the Judges of the Circuit and County Courts.

By the 18th section, it is provided, that the said Court shall be a Court of record, and the same proceedings shall be had therein as provided in the Circuit and County Courts.

The 22d section provides, if either party shall be dissatisfied with the decision of the Judge, or the verdict of a jury, the cause may be removed into the Circuit Court, either by *certiorari* or appeal. This section also provides for the mode of summoning witnesses, after the cause is so removed, from which it may be inferred the trial is to be had *de novo*.

The 23d section provides, that all persons residing within the limits of the city, shall be amenable to the jurisdiction of

the Court, which shall in no wise exempt them from the jurisdiction of the several Circuit and County Courts. Acts of 1840, p. 49, 50.

A very brief examination, we think, will suffice to show that this Court has no appellate or revisory powers. In the first place, all its powers are confined to the limits of the City, and none are amenable to its jurisdiction, who reside elsewhere.—The jurisdiction of a justice of the peace, generally extends over his beat, and unless questioned, over his entire county. If the City Court could award writs of *certiorari*, it would frequently bring persons under its jurisdiction, who were residents elsewhere, and thus extend the powers which are given by the 23d section; but the conclusive objection to this claim of power, is, that instead of subjecting *defendants* to its jurisdiction, *plaintiffs* would be forced there to adjudicate their claims.

We cannot perceive any reason whatever, to suppose the legislature intended to confer any appellate jurisdiction on this Court.

Let the judgment be affirmed.

BAILEY, USE, &C. v. WHITE.

1. The defendant covenanted to pay to the plaintiff a certain sum of money on a day designated, if the latter would deliver to him possession of the plantation on which he then resided, on a previous day; *provided*, that the defendant might discharge his obligation to pay the money, by permitting the plaintiff to retain the possession of the plantation until the day of payment arrived: *Held*, 1. That the covenant to pay the money was *dependent*, and a delivery of the possession of the plantation, or something equivalent should have been alleged in the declaration. 2. If the obligation to pay was discharged by the permission to occupy, the defendant should have shown it, in his defence.

Writ of error to the Circuit Court of Cherokee.

THE plaintiff in error declared against the defendant, in covenant, upon a writing obligatory, executed on the thirty-first day of July, 1835, for the payment of two hundred dollars, on or

Bailey, use, &c. v. White.

before the first day of January, 1837. The defendant cravedoyer of the writing sued on, set it out *in extenso*, and demurred. The writing is as follows: "On or before the first of January, eighteen hundred and thirty-seven, I promise to pay to Wm. Bailey, two hundred dollars, on condition that the said Bailey gives me or my executors, or assigns, possession of the plantation where he now resides, on the first of January, eighteen hundred and thirty-six, which is the agreement between said Bailey and myself, for which he has given me a deed of conveyance. But on the contrary, should I permit the said Bailey to remain on the plantation until the first of January, eighteen hundred and thirty-seven, then the above bond to be null and void. Given under my hand and seal.

July 31st, 1885.

JOHN A. WHITE, [Seal.]"

The Circuit Court sustained the demurrer, and rendered a judgment against the plaintiff for costs.

MOORE, for the plaintiff, cited 2 Stew't & P. Rep. 60; 7 Porter's Rep. 133; 1 Chitty's Plead. 353-4; Glazebrook v. Woodrow, 8 T. Rep. 366.

PHELAN, for the defendant, relied upon 1 Chitty's Plead. 353, to show that the delivery of the possession of the plantation, was a condition precedent to the liability to pay the sum sought to be recovered.

COLLIER, C. J.—Covenants are either *dependent, concurrent, or mutual and independent*. The first depends on the prior performance of some act or condition, and until the condition is performed, the other party is not liable to an action on his covenant. In the second, mutual acts are to be performed at the same time, and if one party is ready, and offers to perform his part, and the other neglects, or refuses to perform his, he who is ready and offers, has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The third sort is, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor; and it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. Platt on

Cov. 71; 7 Petersd. Ab. 105; Pordage v. Cole, 1 Saund. Rep. 319, 320, note 6.

Though rules have been laid down, by which to test the character of covenants, yet it is said to be difficult to furnish any clear and precise rule by which the distinction between covenants and conditions can be accurately ascertained. Some of the old cases recognised distinctions too nice and refined to be understandingly applied, running counter, it is said, to the meaning of the parties, and the real justice of the case; but the rule laid down by Lord Mansfield, and now established, is, that the dependence or independence of covenants, is to be collected from the evident sense and meaning of the parties; and that however transposed they may be in the deed, their precedence must depend on the order of time in which the intent of the transaction requires their performance. Platt on Cov. 71, *et post*; Powers, *et al.* v. Ware, 2 Pick. Rep. 451; Goodwin v. Linn, *et al.* Wash. C. C. Rep. 714.

In Glazebrook v. Woodrow, 8 T. Rep. 366, the plaintiff covenanted that he would convey on or before the first of August, and the defendant, that he would pay on or before the same day, the Court held that the covenants were dependent, and that to entitle the plaintiff to recover, a conveyance, or an offer to convey, should have been alleged and proved. See, also, Goodisson v. Nunn, 4 Term Rep. 761. And it may be laid down as a general rule, where the consideration is to be performed before the day specified for the payment of the money, the performance of the consideration ought to be averred in an action for the money; or where two acts are to be simultaneously done, as where one party is to pay a sum of money on the same day on which the other is to convey an estate, as the consideration for the payment, neither can maintain an action without showing a performance, or an offer to perform on his part. Russell v. Ward, Wm. Jones' Rep. 218; Pordage v. Cole, 1 Saund. Rep. 320, note 6; Clay v. Straughan, 5 Monroe's Rep. 386; Tomkins v. Elliott, 5 Wend. Rep. 496; Slocum & Hogan v. Despard, 8 *ibid.* 615; Fairfax v. Lewis, 2 Rand. Rep. 20; Benson v. Hobbs, 4 Har. & Johns. Rep. 285; Northup v. Northup, 6 Cow. Rep. 296.

In a declaration in covenant, it is sufficient to state the deed according to its legal effect and operation. Swallow v. Beau-

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mount, 2 B. & A. Rep. 765; Backus v. Taylor, 6 Munf. Rep. 488; Bustors, Ex'r. v. Wallace, 4 Hen. & Munf. Rep. 82.— And in Jackson and another v. Sagacer, 3 Monroe's Rep. 27, the plaintiffs in error promised to pay "Sagacer or assigns, four hundred dollars worth of merchantable whiskey, in good casks, as specified in our agreement of this date, at forty-two cents per gallon," and the question was, whether the agreement referred to in the covenant, should have been stated in the declaration. The Court held there was no necessity for setting forth in the pleadings any other agreement, than that contained in the covenant itself.

In respect to the allegation of a breach, it may be assigned, either in the words of the covenant, or according to the intent and meaning of the parties. Boscawen, *et al.* v. Cook, 1 Mod. Rep. 223; Griffith v. Goodhand, T. Jones' Rep. 191; S. C. Skinner's Rept. 39; Bristock v. Stanton, 1 Ld. Raym. Rep. 106; Quackenboss v. Lansing, 6 Johns. Rep. 49; Bustors, ex'r. v. Wallace, (*Supra*) Day, *et al.* v. Chism, 10 Wheat. Rep. 449.

If, in declaring on a covenant, a material part is omitted, the defendant may take advantage of the omission by craving oyer and demurring. Gardner, *et al.* v. Gardner, *et al.* 10 Johns. Rep. 47; Santavord v. Sanford, 12 *ibid.* 197; Kane v. Sanger, 14 *ibid.* 89; Dunham v. Pratt, *ibid.* 372; Henry v. Cleland, *ibid.* 400; Asberry v. Calloway, 1 Wash. Rep. 72; Legg v. Robinson, 7 Wend. Rep. 194; Mayor and Aldermen of Tuskalooşa v. Lacy, at this term.

It now remains to apply the principles we have stated to the case before us. The parties, we think, have very intelligibly expressed their intention; and their contract may be thus stated: the defendant undertakes to pay to the plaintiff the sum of two hundred dollars, on the first of January, eighteen hundred and thirty-seven, if the latter would deliver to the former the possession of the plantation on which he resided at the time the contract was made; on the first day of January, eighteen hundred and thirty-six: *Provided, however*, that the defendant might discharge his obligation to pay the money, by permitting the plaintiff to retain the possession of the plantation until the day appointed for its payment. This exposition of the covenant seems to us very clearly to result from the terms in which

it is expressed ; for although a day certain is mentioned when the money is to be paid, yet the obligation to pay, is only to become absolute upon the prior performance of a condition, viz: the delivery of the possession of the plantation, which the deed asserts was the agreement between the parties. In this view of the case, the covenant of the defendant is dependent, and cannot be coerced, unless the plaintiff has performed, or offered to perform the condition.

But suppose it be conceded that the payment of the money and delivery of possession, were acts to be simultaneously done, and then as we have seen, the plaintiff could not recover without averring and proving an offer of performance on his part. According to no rule of interpretation can the undertaking of the defendant be regarded as independent of any act to be done by the plaintiff. The covenant of the plaintiff does not profess to be made in consideration of an *engagement* by the defendant to perform his part of the contract, but in consideration of its *actual performance*, and according to the principles laid down, does not impose an absolute legal duty.

In his declaration, the plaintiff should have alleged a delivery of the possession of the plantation, or an offer to deliver it, to have entitled himself to recover the two hundred dollars; and if the obligation to pay was discharged by the permission to occupy it during the year of eighteen thirty-six, the defendant should have shown it as an affirmative fact, going to avoid his undertaking. The covenant itself being sufficiently explicit to show the meaning of the parties, there was no necessity for setting out, on the part of the plaintiff, the agreement or deed to which it refers.

From what we have said, it follows, that the declaration falls short of stating the covenant, according to its legal effect. But it is insisted that the Circuit Court should not have rendered a final judgment upon sustaining the demurrer to the declaration, but an opportunity should have been afforded to the defendant to amend. By the act of 1824, "to regulate pleadings at common law." Aik. Dig. 277,—it is enacted that "no demurrer shall have any other effect than that of a general demurrer, and the Courts at any time previous to the term at which such demurrer shall stand for argument, may allow the party, on application, to amend his pleadings, without terms, and after judg-

ment in favor of the demurrer, may authorise an amendment, on terms," &c. It was certainly proper if the plaintiff applied for leave, to have permitted him to amend his declaration "on terms," after the demurrer was sustained, but the record does not show that he was denied that privilege, and we cannot presume that he was. Where an application to amend is refused, a revising Court can only be informed of it by the record.

We have only to add, that the judgment of the Circuit Court is affirmed.

FLETCHER V. GAMBLE.

1. A confession of judgment by the principal debtor, in favor of the creditor, and stay of execution by him until the next term of the Court, without the knowledge or consent of the surety, is not such a giving day of payment as will exonerate the surety from liability to the creditor.

Error to the Circuit Court of Limestone.

THIS was an action of debt, brought by the defendant in error against the plaintiff in error, on a note executed by the defendant, and one Eldred Rawlins, not sued in the action. The defendant pleaded a set-off, with leave to give any matter in evidence which would constitute a good special plea in bar, upon which issue was joined.

From a bill of exceptions taken at the trial of the cause, it appears that the plaintiff read the note in evidence, to the jury, and rested his cause. The defendant then read to the jury the following record of a judgment of the same Court, of the 3d of September, 1839, in favor of the plaintiff, against Eldred Rawlins, and of the stay of execution given by the plaintiff to Rawlins. "James H. Gamble v. Eldred Rawlins. Came the parties, in proper person, and said defendant acknowledges the plaintiff's action, and confesses judgment for the sum of twenty-four hundred and thirty-four dollars and seventy-eight cents,

the amount of the plaintiff's debt. It is, therefore, considered by the Court, that the plaintiff recover of said defendant his debt, in manner aforesaid confessed, and the costs, &c. and the plaintiff stays execution six months."

The defendant further proved, that the said judgment was confessed for the debt due to the said Gamble from the said Rawlins, upon the note which is the foundation of this action, and that the defendant is the surety only of the said Rawlins, in the said note. The defendant also proved that the said judgment was confessed, and the stay of execution given without his knowledge or consent, and that the judgment was confessed by Rawlins, at the request of the plaintiff; which being all the evidence, the Court charged the jury that the said stay of execution did not discharge the defendant from his liability.—To which charge the defendant excepted; and now assigns for error.

HOPKINS & McCLUNG, for plaintiff in error, contended that the judgment confessed, with stay of execution, was such a giving of time to the principal, without the consent of the surety, as would exonerate the surety from liability. That by the stay of execution, the creditor had tied up his hands from proceeding against the principal debtor, for six months; that the surety on the payment of the debt would be entitled to stand in his place, and to conduct the suit for his own benefit, which by this arrangement he was prevented from doing. That if the surety elected to pay the debt, he could not proceed against the principal until the stay of execution was out. That by this postponement of his right to sue, he might be deprived of the extraordinary remedy by attachment.

They contended that the record itself was evidence that there was a sufficient consideration for the agreement to stay the execution; that the whole was one entry, and to be considered altogether, and that, if execution had been sued out before the stay had expired, that it could have been superseded. That it was not necessary to show that the surety was injured; it was sufficient that the creditor had made a binding arrangement with the principal, by which time was given without the consent of the surety.

In support of these positions, they cited Theobald on Surety,

227; 10 Johns. 525, 587; 1 Johns. Cases, 137; 3 Bibb, 467; 3 Merivale, 272; 1 Call, 182; 2 ib. 46, 125; 1 Taunton, 159; 15 East, 615; 2 American Dig. 407, 408; 2 Vesey, 540; 1 Mun. 269.

COOPER & ROBINSON, contra, argued, that there was no consideration whatever, for the stay of execution, and that it interposed no obstacle whatever, to any right, either the creditor or surety might have. That by the stay, no time was given; that the execution issued as soon as it could have done, if judgment had been obtained in the ordinary mode. They further insisted that the stay of execution opposed no obstacle to any remedy the surety was entitled to, on payment of the debt. To maintain these views, they cited 18 Johns. 28, 10 Yerger's Tenn. 111; Theobald on Prin. and Surety, 133, 161, 162; 4 M. & R. 561; 9 B. & C. 707; 4 Yerger, 182; 2 Pickering, 614; 17 Johns. 389; 4 Har. & McHen. 41; 1 Carr. & P. 532; Holt, N. P. 84; 2 Gill & Johns. 230; 16 Johns. 70; 1 Ala. Rep. 523.

ORMOND, J.—The question to be decided is, whether a confession of judgment by the principal debtor, and stay of execution by the creditor for six months, without the knowledge or consent of the surety, will discharge the liability of the surety to the creditor.

The doctrine applicable to this case, is borrowed from Courts of equity, and is thus stated by Mr Justice Story, in his work on Equity. "If a creditor, without any communication with the surety, and assent on his part, should afterwards enter into any new contract, inconsistent with the former contract, or should stipulate in a binding manner, upon sufficient consideration for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety. 1 Story's Eq. 321, § 326.

The reason that giving day of payment, operates in equity to discharge the surety, is, that the creditor has, by his own act, deprived himself of the power of doing that, which the creditor has a right to call on him in a Court of Equity to do—to sue the principal. And has, also, deprived the surety of the right of paying the debt, and proceeding, himself, against the principal. The rule is thus concisely stated by C. B. Alexander, in Heath

v. Kay, 1 Y. & J. 434. "In order to discharge a surety, there must be a contract between the creditor and principal debtor, so as to prevent the surety from having the same remedy against the principal debtor, as he might have had upon the original contract."

It might seem, that the mere giving day of payment by the creditor, would not prevent the surety from paying the debt to the creditor, and proceeding immediately against the principal. This is answered by Lord Eldon, in *English v. Darley*, 2 Bos. & Puller, 61. "If a holder enter into an agreement in the morning, with a prior indorser, not to sue him for a certain time, and then obliges a subsequent indorser in the evening, to pay the debt, the latter must immediately resort to the very person for payment, to whom the holder had pledged his faith, that he should not be sued." However, this may savor of refinement, it is too firmly fixed as law, to be now disturbed; and therefore, the only question is, whether the creditor has, by a binding contract with the principal debtor, without the consent the surety, postponed the payment of the debt, to the prejudice of of any right secured to him.

The counsel for the defendant in error, have argued that the stay of execution allowed in this case, was not obligatory on the principal. We are of opinion, that the confession of judgment by the principal, and stay of execution by the creditor, is but one act, and that the latter must be considered as the condition upon which the former was obtained; and we cannot doubt, that if the creditor had sued out execution before the time stipulated, it might have been superseded. Was this suspension of the power to issue execution, which we have seen, was obligatory on the creditor, a discharge of the surety? To have that effect, it must be shown that it deprived him of some right he otherwise would have had; for unless this is the case, it cannot operate to his prejudice.

The judgment was confessed during the sitting of the Court, with stay of execution, until the next term; and if the suit had been commenced in the usual mode, and the defendant had made no defence, nor entered an appearance, no judgment could have been obtained until the period when, by the agreement, the execution could issue. And the result of the agreement was, merely what the silent operation of the law would

have accomplished without the action of the parties; at least, the judgment could not have been obtained under any possible state of things, sooner—but many casualties may have occurred to postpone it for one or more terms longer.

If the surety had filed his bill in equity, to compel the creditor to sue the principal debtor, or had given notice in writing, under our statute, requiring suit to be brought, in either event the result could not possibly have been more favorable to him than the course pursued by the creditor, which produced a judgment sooner, and the right to execution at least as soon, as in either of the modes just spoken of, without computing the delay, which would be inevitably, consequent, upon the employment of either of the compulsory modes just adverted to.

When the creditor, by an agreement, on sufficient consideration, deprives himself of the power of bringing suit against the principal debtor, he ought not to be permitted afterwards to resort to the surety; but when the creditor voluntarily does the very thing which the surety could compel him to do, and obtains judgment and execution with no more delay than the law gives to the debtor, it is difficult to conceive how the surety could be prejudiced, or how such a proceeding could impair a right, which if exercised, could not possibly have been more favorable to him.

The law on this subject, as applicable to contracts in *pais*, by which time is given to the prejudice of a surety, has no application to proceedings in Courts of justice, unless the creditor gives time beyond the necessary delay of a Court of Justice. Thus in the case of *Hulme v. Coles*, 2 Simons, 12. Coles had commenced an action against the principal debtor, and without the privity of the surety, took from the principal a *cognovit*, on the 23d June, 1817, for the amount of the debt, with a stipulation, that no judgment should be entered up, or execution issued, until the 1st of August following. It was contended for the surety, that this was a giving of time, to the prejudice of the surety; to which it was replied, that the judgment was obtained sooner in this mode, than in the ordinary course, and that, therefore, the surety was not prejudiced. The Vice Chancellor declared, that the principle of discharging a surety by the giving of time by the creditor, was a refinement of a Court of Equity, and he would not refine upon it. By the arrange-

ment complained of, time was not given, but the remedy was accelerated.

So, in *Jay v. Warren*, 1 Carr. & Paine, N. P. C. 532, Chief Justice Abbott held, that in an action by an indorsee against an indorser, the fact that the plaintiff had taken from the acceptor a *cognovit*, giving three weeks time, but which was a period short of that in which judgment could have been obtained against him, did not discharge the indorser.

The case of *Nisbet v. Smith*, cited from 2 Brown, C. C. 579, does not, at all conflict with the principle here laid down.— There, the creditor, on the request of the surety, commenced a suit against the principal, and held him to bail, but afterwards, at the instance of the debtor, waived the proceedings upon his executing a warrant of attorney to confess a judgment; upon the warrant, a memorandum was indorsed, that no execution should issue on the judgment for the term of *three years*, if the interest was regularly paid.

The relief in this case, is not placed by the chancellor on the ground that there was a warrant of attorney to confess a judgment, but that there was a stay of execution for three years, which was a credit for that length of time, without the consent of the surety.

The principle of these cases, evidently is, that the delays of a Court of Justice, are given to the debtor by operation of law, and therefore, an arrangement which results in the obtaining a judgment as soon as it could be obtained without it, is not giving time, because, in point of fact, there is no delay. The creditor, so far from tying up his hands from proceeding against the principal debtor, is pursuing him to judgment as rapidly as possible, and thus obtaining the means of ascertaining the ability of the principal to pay. If, however, he, by contract, restrains himself in the exercise of the means placed in his hands, by the law, for coercing payment from the debtor, the surety is injured, and will be discharged. This is the point on which the case last cited, turned, where the power to issue execution was suspended for three years, whilst the two former are express to the point, that although the creditor may, on obtaining a confession of judgment, or as the condition on which a judgment should be confessed by the principal, agree to wait with, or suspend proceedings against the principal until such time

arrives, it will not be giving time to the principal, unless the suspension exceeds the period within which, by the most vigilant pursuit, a judgment and the power to issue execution, could be obtained.

The whole foundation of this doctrine, of the discharge of a surety, by the creditor giving time to the principal, rests on the right of the surety to compel the creditor to sue. The proceeding then, in this case, was merely what the surety could have compelled the creditor to institute—he has commenced it voluntarily, and in a mode more beneficial, because more speedy than the compulsory mode provided by law; and it would, in our opinion, be most unreasonable to permit the surety to avoid his contract, merely because the compulsory process of the law has not been resorted to, to bring the principal debtor into Court; for that is the objection, when it is fully examined. It is true, that when a contract is entered into, by which the creditor has tied up his hands from suing, Courts will not enter upon the inquiry, whether the new contract is more or less beneficial to the surety, than the original contract; but here, there, is no new contract made, and the delay stipulated for, if it can be so called, is such as the law itself gave to the principal debtor.

It was also insisted, by the counsel for the plaintiff in error, that the surety has a right, while the suit is pending against the principal debtor, to pay the debt, and carry on the suit for his own benefit; or if paid after judgment, to an assignment of the judgment. And to strengthen this view of the case, it was supposed, that if the debtor should do any act while the suit was in progress, which would authorise an attachment under the recent statute of this State, to be issued, that although the surety could not call on the creditor to pursue this extraordinary remedy, he might do it himself, by paying off the debt, and acquiring the right to manage the suit.

The error of this argument, lies in the supposition, that a surety, by paying of the debt, acquires any rights through the instrument itself, on which he is a surety. By the payment of the debt, the instrument by which it was secured, becomes *functus officio*—the surety does not, in equity, by the payment, become the assignee of the original creditor, but is merely a simple contract creditor of the principal debtor. This point

was thus ruled, in *Copis v. Middleton*, 1 Turn. & Russ. 224, and in *Hodgson v. Shaw*, 3 Myln & Keene, 183, in both of which cases, the question was most elaborately considered by Lord Eldon and Lord Brougham. The same principal was also affirmed by this Court at the present term, in the case of *Foster v. The Athenæum*. If, then, the instrument by which the surety was bound, is discharged by its payment, it legitimately follows, that any judgment founded on it, must be also discharged; and that if it be paid while a suit is in progress, founded on it, it would be a bar to the further prosecution of the suit. Suppose a judgment against the principal and surety, paid by the surety, no one would suppose that the execution could be re-issued against the principal debtor, for the benefit of the surety, because the judgment would be discharged by the payment.

The general rule, it is true, is, that the surety on payment of the debt, is subrogated to all the rights of the creditor, and to the benefit of all securities which he had obtained from the principal debtor, but this must certainly be confined to such securities as continue to exist after the payment of the debt, and cannot be extended to the *security*, by which the debt is evidenced, as that is destroyed in the very act of its payment.

The decision cited from 1 John. Cases, 137, in which an attachment was allowed to proceed for the benefit of a surety, who had paid the debt to the plaintiff in attachment, appears to have been founded on the attachment law of that State, and is not placed by the Court on any general rule of law.

The case of *Peay v. Poston*, 10 Yerger's Rep. 111, is, in principle, like this case, and the Court attained the same conclusion we have done in this, but by a process of reasoning, somewhat different; as the Court seem to think that the stay of execution was not an obligatory act; and although we are entirely satisfied that the result is right, we think the stay of execution binding on the creditor, but for the reasons we have given, no infringement of any right of the surety.

Our first impression on the examination of this case, was, that although it was impossible to suppose that the act of the creditor was injurious to the surety, yet, that according to the established doctrine, it was a binding stipulation by the creditor, for delay, without the consent of the surety, and therefore,

he was discharged. But upon subsequent reflection and examination, we became satisfied that no right of the surety was impaired by the transaction between the creditor and principal debtor; and that it would be a solecism to hold that the voluntary performance by the creditor, of the very act which the surety, at considerable delay and expense, might have insisted on being done, would, when done, voluntarily and without delay or expense, discharge the surety.

The judgment of the Court below, is therefore, affirmed.

THE STATE OF ALABAMA V. MILLER.

1. A grand jury legally constituted of thirteen members, is competent to act, although it may subsequently be reduced, by the absence of one juror, to twelve: and this is also the case, notwithstanding the Court, by statute, has the authority to re-constitute the grand jury, on account of the absence or inability to serve, of all or any of the grand jurors.

Question reserved by the Circuit Court of Mobile County.

THE defendant was indicted at the February term, 1841, for keeping and exhibiting a faro-bank. He pleaded, in abatement of the indictment, that it was found by a grand jury not legally constituted; verdict and judgment in favor of the State.

At the trial, the defendant proved that the indictment was found by a grand jury impanelled at the Fall term, 1840, then consisting of thirteen members, and that only twelve of them appeared and acted as the grand jury, at a special term, in February, 1841, when the bill was found. On this evidence, the defendant requested the Court to charge the jury, that twelve men could not form a grand jury; and if but twelve men were present at the time of finding, the indictment was bad, and the issues should be found for the defendant. This, the Court refused, and charged the jury, that if the grand jury at the Fall term, 1840, consisted of thirteen members; of which, but twelve

appeared and acted as a grand jury at the special term, and as such, found the bill; it was a good bill of indictment.

The question, however, was reserved as novel and difficult, for the decision of the Supreme Court.

J. GAYLE, Jr. for the defendant,—cited Aikin's Digest, 296, § 6; Meek's Sup. 77, § 3; and insisted, that the statute having directed, that not less than thirteen members should be sworn, was decisive to show that less than that number were incompetent to act.

THE ATTORNEY GENERAL, contra—cited, Croke's Eliz. 654; 4 Greenl. 439; 2 Hale, 161; 1 Chitty, C. L. 251.

GOLDTHWAITE, J.—The general statute under which our grand juries are organized, directs that from the whole number of jurors attending, there shall be drawn, not less than thirteen, nor more than eighteen, who shall constitute the grand jury for the term of the Court, to which they are summoned: Aik. Dig. 296, § 6.

In our opinion, this does not change the common law, except so far as it invests the Court with a discretion, within the limits specified, as to the number to be sworn. Here, it appears that a grand jury was legally constituted, according to the terms of the statute, and the question presented, is nothing but this—whether the grand jury is dissolved or incompetent to act, whenever from any cause, its members are reduced below thirteen in number?

At the common law, although a grand jury might consist of twenty-three jurors, the concurrence of only twelve, was essential to the finding of a bill; and we find nothing in the books to authorise the belief, that the deliberation of a greater number, is to be considered as essential. The reason why grand juries, at the common law, were constituted with a greater number than twelve, most probably, was to prevent the failure of criminal justice, that might otherwise have occurred by the dissolution of the grand jury, in consequence of the death or absence of one juror. If such a provision had ever been considered as essential to the liberty of the subject, we doubtless should have found it so stated; on the contrary, the variation of number, which was permitted, is persuasive, to show that

the excess above twelve, was introduced only, to guard against the difficulties which were obvious, if only that number was empannelled.

The act, organizing the Courts of the 10th circuit, gives power to the Judge, (within the three first days of the special term,) to draw a grand jury, or to supply the places of any of those who constituted the jury at the previous term, and who at the special term are absent, sick or excused. Meek's Sup. 77, § 3.

But this, no more than the general law, imposes the obligation that the jury, when once legally constituted, shall be dissolved or incompetent to act, because more than twelve jurors are not present.

It seems to us, that the powers thus given, are intended to provide means, by which the jury may be preserved in an efficient state, by the appointment of new members within a limited time, and that it is not a proper conclusion, to infer, that the Legislature intended that a grand jury should be dissolved, when ever from any cause, only twelve jurors could be in attendance.

We think there is no error, and the judgment is affirmed.

COLLIER, C. J.—By a statute passed in 1811, it is provided, that not less than thirteen, nor more than eighteen, shall constitute the grand jury for each term of the Circuit Courts. Aik. Digest, 296. The object of the law, in requiring this number, doubtless is, to secure to the public and those accused of offences, the benefit of their deliberation, and not merely to insure the attendance of twelve jurors. That the concurrence of this latter number, is sufficient to authorize the finding of a *true bill*, cannot be questioned, but that the grand jury should be complete; especially in a case originating where the one before us did, I think is shown by the third section of the act for the organization of the Courts of the tenth Circuit; which section applies exclusively to the Circuit Court of Mobile. That section is as follows: "The grand jury summoned for the fall term of the Circuit Court, shall serve at the February term of the special Court; and the grand jury summoned for the Spring term of the Circuit Court shall serve at the Summer term of the Criminal Court. *Provided*, that the

Judge of said Court, shall have power, within the first three days of the special term, to draw a grand jury, or any number of grand jurors to supply the places of any who shall be sick, absent, or excused from service on the same; and the said Court shall have the same powers for the purpose of forwarding business, as is confided to the Circuit Court." Act of February 5, 1840.

The terms "shall have power," as used in the *proviso*, it has been held, may be construed as either directory or imperative, according to circumstances. "Where the statute directs the doing of a thing for the sake of public justice, or the public good," *may* is construed to mean *shall*. The King as Barlow, 2 Salk. Rep. 609; Carth. Rep. 293. And in the case of a public officer, *may* is tantamount to *shall*. The King v. The inhabitants of Derby, Skinner's Rep. 370. In the Newburgh Turnpike Company v. Miller, 5 Johns. Ch. Rep. 113, Chancellor Kent held, "that whenever an act to be done under a statute, is to be done by a public officer, and concerns the public interest, or the rights of third persons, which require the performance of the act, then it becomes a duty in the officer to do it." See also, *Ex parte Simonton, et al.* 9 Porter's Rep. 390. In the first case cited, the terms of the act which the Court considered were, "the Church-wardens shall have power to make a rate;" these words were construed to impose a peremptory duty; and such in my opinion, must be the construction of the proviso of the special act quoted.

Hence, I am in favor of reversing the judgment of the Circuit Court.

GRIGSBY'S EX. AND EXT'X. V. NANCE.

1. Where a defendant demurs and pleads to the entire declaration, the plea being posterior in the order of proceeding, operates as a waiver of the demurrer.
2. Where a promissory note is payable to the plaintiff *generally*, this is an admission of his right to receive the amount, and estops the defendant from insisting that the beneficial interest is in others; especially, when it is admitted on the record that the plaintiff was authorised to take the note in the form he did.
3. One partner may sue another, *at law*, on a note which the latter gave him upon engaging in business, for the payment of a part of the capital stock: and *Seemle*, if one partner give the other his note or acceptance, for value received, on the partnership account, an action will lie on such note or bill.

THE defendant in error, brought an action of *assumpsit*, against the plaintiffs, in the County Court of Dallas, on a promissory note, of the following tenor:

SELMA, JULY 18, 1838.

Ninety days after date, I, John A. Cowles, as principal, and Uriah Grigsby and Henry Traun, as securities, jointly and severally promise to pay R. R. Nance, or bearer, five thousand dollars, value received, negotiable and payable at the Real Estate Bank of South Alabama, at Selma.

JOHN A. COWLES,
URIAH GRIGSBY,
HENRY TRAUN."

The defendants demurred to the declaration, but no notice seems to have been taken thereof. They also pleaded:

1. *Non-assumpsit*.
2. Want of consideration.
3. Failure of consideration.
4. That the plaintiff was not at the time of the commencement of this suit, nor at any time before, or since, the legal owner and *bona-fide* holder and payee, nor the sole and *bona-fide* beneficiary of said note, but the same is, and was, at the time of the commencement of this suit, the joint property of a company of individuals, known and styled as the Real Estate Banking Company of South Alabama at Selma, of which company was the defendant's testator, Uriah Grigsby, in his lifetime a

member, and entitled to share in the profits of said Association, all the gains of said institution or banking company; that all the members of said association at the time of their partnership executed each in like manner; their joint and several notes to R. R. Nance, or some other person who was known by the members of said firm, association or company, to be the agent or agents of said firm, association or company for divers sums, varying, *pro rata*, according to the amount of stock taken by the different members of said firm, association or company, respectively. That since the making of the note sued on, there has not been a balance struck between said member and the other members of said company (whose names are not set out) nor between said last mentioned persons and the defendants: nor did the said Grigsby, in his lifetime, acknowledge any balance to be due and in arrears by him to said persons on the note aforesaid, or on any other score, nor have the defendants since. And this they are ready to verify.

5. That the plaintiff is not, nor ever was the legal or equitable owner or proprietor of the note, but the same is the property of an association of individuals, known as the Real Estate Banking Company of South Alabama, at Selma. The plaintiff joined issue on the first, second and third pleas, and demurred to the fourth and fifth; the demurrer being sustained, the issues were submitted to the jury.

On the trial, the defendants introduced evidence to prove that the plaintiff was not the sole owner or beneficiary of the note sued on, and that the same was the property of the Real Estate Banking Company of South Alabama, at Selma, and that defendant's testator was a partner of that company. Thereupon, they moved the Court to instruct the jury, that if they believed, from the testimony, that R. R. Nance, the plaintiff, was not the sole owner or beneficiary of the note sued on, but that the same was the property of the banking company, as shown by the proof, and the defendant's testator, was a partner of that company, and no balance had been struck between them, then the jury must find for the defendants; which instruction being refused by the Court, the defendants excepted.

A verdict being found for the plaintiff, and judgment thereon being rendered, the defendants have prosecuted a writ of error to this Court.

G. W. GAYLE, for the plaintiffs in error—cited 4 Porter's Rep. 49; 1 Ala. Rep. N. S. 521; Livingston & Ware v. Croch-eron, at this term; 1 Chitty's Plead. 2, 9, 13, 14, 45, 7th ed.

EDWARDS, for the defendant—cited, 3 Peters' Cond. Rep. 14, 15, 16; 8 Cranch Rep. 30; 13 East' Rep. 7; 1 Story's Eq. 616; Chitty on Bills, 9 Am. ed. 70, 71, 72, 13 Eng. Com. Law Rep. 383, 384; 11 ibid. 26; 1 Chitty Plead. 276; Collyer on Partner. 149, 647, 648.

COLLIER, C. J.—It has been so often decided, as to be now indisputably settled, that where a defendant demurrs and pleads to the entire declaration, his plea being posterior in the order of proceeding, is a tacit withdrawal of the demurrer, or an admission that it should not be sustained; and he cannot be allowed to allege on error, the omission of the Court to render judgment upon it. It is not pretended, that the declaration is defective, if objectionable, the demurrer to the pleas might be visited upon it. The questions then to be considered are,

1. Can a party maintain an action on a promissory note *payable to himself*, the money due on which, when collected, belongs to a third person.

2. Can the agent of a partnership maintain an action against one of the partners, on a promissory note, payable to himself.

1. The payee of a promissory note has a legal interest therein, and if not paid at maturity, may maintain an action on it; for it may be laid down as a general rule, that wherever a *legal* right is created, or liability imposed in favor of, or upon a person through the medium of a bill of exchange, or promissory note, that right may be asserted and that liability enforced by and against the person entitled, or chargeable. Hence, it has been held, that a person may sue on a note payable to himself, though in trust for a third party. *Smith v. Kendall*, 6 T. Rep. 123; *Randall v. Bell*, 1 M. & S. Rep. 723, and a note can only be indorsed by the payee, so as to invest the indorsee with a right of action in his own name. *Chitty on bills*, 251, 265, 9th Am. ed.

In the case at bar, the note is payable to the plaintiff, generally, and this is an admission, that he is entitled to receive the amount thereof, and must estop the defendants from insisting that the beneficial interest is in others; especially when it is ad-

mitted upon the record that the plaintiff was authorised by those he represented, to take the note in the form he did. The defendants, it is clear, if liable, cannot be prejudiced by a recovery against them in the name of the plaintiff, as the judgment would bar all proceedings against them at the instance of the persons to whom the money is to be ultimately paid. The case of *Bryant v. Owen*, 1 Porter's Rep. 201, is unlike the present. In that case a promissory note payable to a certain person, or bearer, was placed in the hands of an attorney for collection, who sued thereon, in his own name, as bearer, the Court held, as the attorney had no legal title to the note, by having become its proprietor, he was not entitled to maintain an action on it.

2. It is not alleged that Cowles, the principal, in the note, was a member of the company of which the plaintiff was agent, but merely that the testator of the plaintiffs, who was security, was a partner; so that it may well be questioned, whether the point sought to be raised by the pleas and bill of exceptions is presented. But we will consider the case, as if it appeared, that all the makers of the note were members of the partnership.

Courts of law, will not entertain suits for the recovery of money due from one partner to another, by simple contract, on the partnership account, because it would be useless for one partner to recover, what upon taking a general account amongst all the partners, he might be liable to refund; *frustra peterit quod mox restitutus esset*. Hence, it has been laid down as entirely clear, that one partner cannot maintain an action against his co-partner; for work and labor performed, or money expended on account of the concern. 1 B. & C. Rep. 74, 76, *Holmes v. Higgins*; *Cansten v. Burke*, 2 H. & Gill. Rep. 295. But it is unnecessary to cite authorities to this point, as the principal has been directly affirmed by several adjudications in this Court. *Lyon v. Malone*, 4 Porter's Rep. 497; *Phillips v. Lockhart*, 1 Ala. Rep. N. S. 521.

The question in the case before us, is not whether an action will lie by one partner against another, to recover money due by a verbal contract on the partnership account; stating it most favorably for the plaintiffs in error, it is this—can one partner be sued at law on a note, which he has given to his

co-partners upon engaging in business, for the payment of his share of the capital stock?

If two persons commence business as partners, and one advance the whole capital, he may maintain an action against his co-partner for a moiety, because as to the share of the partner, who has not paid, the partnership may be considered as not commenced. The law was so ascertained in *Helme v. Smith*, 7 Bing. Rep. 709, where it was held, that if there be three intended partners, and one of them fail to bring in his share, the other two may recover it from him by action at law. So if one partner give the other his promissory note, or his separate acceptance for value received on the partnership account, an action will lie on such note, or bill. *Van Ness v. Forest*, 8 Cranch's Rep. 30. And if one partner draw upon all the others by name, and they individually accept, he may recover against them, because by such acceptance, a separate right is acknowledged to exist. *Neale v. Turton, et al.* 4 Bing. Rep. 149; *Gibson v. Moore*, 6 New Hamp. Rep. 547; *Burnell v. Minot*, 4 Moore's Rep. 340; *Vening v. Lukie*, 13 Easts Rep. 17; *Smith v. Barron*, 2 T. Rep. 476.

In *Lyon v. Malone*, 4 Porter's Rep. 497, it appears that a partnership had existed between the parties, which was dissolved and all the remaining books and accounts of the partnership, to an amount exceeding six thousand dollars, were placed in the hands of Malone, to be collected for their joint benefit; that afterwards, Malone paid a debt due from the firm, and took from Lyon, the note on which the suit was brought. At the time of the trial, all the debts of the partnership had been paid, but the accounts of the partners, as between themselves, were unsettled. Malone had rendered no account, nor did it appear, what amount of money had been collected from the books, &c. or whether enough to pay the debts. After a review of many of the authorities, the Court were of opinion, that Malone might sue at law on the note: that it was an admission of an indebtedness by Lyon, which was operative, notwithstanding the partners had never had a final settlement, and struck a balance. This case is recognised in *Phillips v. Lockhart*, 1 Ala. Rep. N. S. 521, as resting upon a very clear principle.

Even conceding, that the form of the note on which the pres-

ent action is brought, interposes no difficulty to the defence set up by the defendants, yet the authorities cited, and the reasoning by which they are sustained, show, that the defence itself is not available.

We have only to add, the judgment of the County Court, is affirmed.

STEELE V. KINKLE & LEHR.

- I. L purchased from K a lot of land on a credit of one, two and three years, with notice of a mortgage, taking from K a bond for title, on the payment of the purchase money, and with a stipulation that his notes could be satisfied in the notes of solvent men—L afterwards sold to S, without disclosing the fact of the mortgage, but without any practice to conceal it, and assigned to him the title bond of K. By an agreement between all the parties, S executed his note in lieu of the notes of L, which were received by K; S took possession, and on the falling due of the first of his notes, tendered the amount, and offered to pay any part of the first note of L unpaid, and demanded a title; and on the declaration of K, of his inability, because of the unsatisfied mortgage, S offered to leave the premises in the condition he found it, and to rescind the contract, which not being acceded to by K, he abandoned the possession—Held, 1. That the mere silence of L, of the existence of the mortgage, was not a fraudulent concealment, as S knew that the title was not in L, but in K, and by ordinary diligence could have ascertained the true state of the title. 2. That the substitution of the notes of S for those of L, was not evidence of a change of the original contract. 3. That as the notes for the purchase money were payable in the notes of solvent men, title could not be demanded until the last note fell due. 4. Whether the title could be demanded from the vendor until the solvency of the makers of the notes was ascertained by payment—Quere.
2. A Court of Chancery will never impute fraud when the facts and circumstances out of which it must arise, may consist with pure intentions.
3. A Court of Chancery will not aid a purchaser to rescind a contract, even in a case of fraud, where there has been a want of common and ordinary diligence.

Appeal from the Chancery Court at Huntsville.

THIS bill was filed by the plaintiff in error, to rescind a contract, entered into between him and the defendant, Lehr. The bill charges, that in January, 1837, Lehr purchased of Kinkle, a lot of ground, in the town of Huntsville, at four thou-

sand one hundred dollars, payable one thousand one hundred in hand, and the residue in three annual instalments of one thousand dollars each, payable in notes on good and solvent men in North Alabama, and that Kinkle executed to him a bond, in the penalty of eight thousand dollars, with condition to make title to the said lot, on the payment of the notes. The bill further charges, that at the time of this sale, there was an incumbrance on the property, consisting of a mortgage, executed by Kinkle and others, to the Solicitor of the Treasury of the United States, for upwards of thirty-six thousand dollars, and of which Lehr was ignorant, but that the same was duly registered.

That on the 4th December, 1837, orator purchased the lot from Lehr, with an express understanding, between him and Lehr, that a good and clear title, in fee simple, should be made thereof to orator, as soon as the notes made by Lehr to Kinkle, should be discharged. In pursuance of which, Lehr assigned the bond for title to orator, as follows: "I assign to G. M. Steele, the within bond for title, and the benefits to which I am entitled under the same, and hereby insure that the title shall be made according to said bond, except that the same shall be made to Steele."

The bill further charges, that as part of the consideration of the purchase by orator, and for the purpose of performing Lehr's contract of purchase, orator, pursuant to a contract between himself, Kinkle and Lehr, and in accordance with the terms of orator's purchase, executed two notes in payment of the two instalments from Lehr to Kinkle, which fell due on the first January, 1839 and 1840, for the payment of one thousand dollars each, and for the residue of the purchase money, executed two bonds to Lehr, for the payment of one thousand dollars each, on the first January, 1841 and 1842, which he transferred by indorsement, to a firm by the style of Echols & Hollowell.

Orator charges, that he has always been able to pay his debts, and on the first January, 1839, offered to Kinkle, to pay him the full amount of the bond to Kinkle, which fell due on that day, and also offered any balance remaining on the first note of Lehr to Kinkle, if Kinkle would convey said lot to orator, which he failed to do, and admitted that he knew not when he could relieve his title from the incumbrance. Thereupon, ora-

tor determined to rescind the contract and abandon the possession of the property, and so informed Kinkle at the time, offering to pay one hundred and fifty-five dollars for the rent of the ground, and to leave the place in as good condition as he received it, or to pay him the difference, if any: all which Kinkle refused, and that Lehr had also notice of the same without delay. Orator immediately abandoned possession of the property, and alleges, that at the time of the purchase, he was ignorant of the existence of the mortgage; that Kinkle and Lehr, if the latter knew of its existence, concealed it from him: that at the time of the rescision of the contract, it was in full force, and was at the filing of the bill, so far as orator knew. That Kinkle has commenced suit on the two bonds executed to him by orator, in the County Court of Madison, and the other in the hands of Echols & Hollowell. The prayer of the bill, is for a rescision of the contract and cancellation of the bonds given for the purchase money; for an injunction to the suits commenced, &c. which was granted.

Kinkle, by his answer, admits the sale to Lehr, but denies that Lehr was ignorant of the mortgage on the property; that the mortgage was duly recorded, previous to that time, and in addition, that Lehr had a distinct knowledge of it, and entered into the contract on the assurance that defendant would be able to make title by the time specified. Admits that complainant purchased as stated in the bill from Lehr; that he took an assignment of the title bond, and executed his notes to respondent, but does not admit, that complainant was ignorant of the mortgage, which was recorded in Huntsville, where complainant then, and still resides, and was of general notoriety. He further admits the tender, demand of title, &c. and that he declined the proposition, because he was not then bound to make title. Admits that he declared he did not know when he could relieve the incumbrance, but states that he was fully able to give any security for the title, to be made according to his contract; and admits that complainant then declared his intention of rescinding the contract, and abandoning the possession, but did not leave it in as good condition as he found it. Admits that he has commenced suit on the notes, and denies any concealment on his part, of the incumbrance, and so far as he knows and believes on the part of Lehr.

He further states, that on the 6th February, 1839, an act of Congress was passed, vesting the heirs of John Brahan, with the entire interest in the debt secured by the mortgage, on the lot purchased by complainant, and that by an arrangement with the heirs of Brahan, he had power to make a deed to the lot previous to the first January, 1840, and has since entirely discharged the mortgage, and is able to make a title, according to his original contract.

Lehr, by his answer, admits the contract for the sale of the lot to complainant, as set forth in the bill, but denies concealing the incumbrance, which he says was recorded in Huntsville, where complainant resided, was generally known, and he thinks must have been known to complainant.

Echols & Hollowell, deny all knowledge of the facts stated in the bill; state that they received the two last mentioned bonds from Lehr, in payment of a debt, and shortly after mentioned the fact to complainant, who made no objection, but stated they were payable in Alabama Bank notes.

The Chancellor, on motion, dissolved the injunction, from which the complainant prayed, and obtained this appeal.

The error assigned, is the dissolution of the injunction.

HOPKINS, for plaintiff in error, insisted, that as the contract between Kinkle and Lehr was, that the notes for the purchase money might be discharged in notes of solvent men, in North Alabama, and that title should be made when the purchase money was paid; that on the receipt by Kinkle of the notes of complainant, and tender of the residue unpaid, he was bound to make title to complainant, and that being unable to do so, complainant had a right to rescind the contract.

That there was a fraudulent concealment by Lehr, of the incumbrance on the lot; that time is of the essence of a contract in a Court of equity, and therefore, it is unimportant that Kinkle is now able to make title. He cited, 1 Story's Com. on Eq. 217, Note, § 208; Sug. on Vendors, 45; 1 Ball & Beattie, 111; 1 Bro. Ch. 440; 2 ib. 390, 420; 13 Wendell, 518; 1 Johns. Ch. Rep. 370, 4 Porter 297; 311, 374, 385, 528.

McCLUNG, contra—contended, that by the proper construction of the deed for title, the parties had no right to call on Kinkle, until the last instalment fell due from Lehr, the first

purchaser. That when property was sold like this, upon a credit, it was no ground for rescinding the contract, that the vendor cannot make title before the time stipulated for making it by the contract, it is sufficient if he is able to do so, at the time he agreed to make it, which is the case here. That no fraud is chargeable in the bill: the mere fact that the incumbrance was not disclosed by Lehr, is not evidence of a fraudulent concealment. He insisted that the principle, that time was of the essence of a contract, did not apply to a case like this, and that if it did, there was no right to demand the title, when the rescision was attempted by complainant.

ORMOND, J.—The facts of this case are, that in January, 1837, the defendant, Lehr, purchased of the defendant, Kinkle, a lot of land in Huntsville, at the price of four thousand one hundred dollars, of which sum, one thousand one hundred dollars was paid down, and the residue secured by three notes of one thousand dollars each, falling due in one, two and three years; Kinkle executing a bond to make title on payment of the purchase money; at the time of the purchase, a mortgage existed for a large sum of money on the lot in question, and other property created by Kinkle, but of which Lehr, at the time of the sale, had express notice.

In December, of the same year, Lehr sold the land to the complainant, for four thousand dollars, payable in equal instalments in four years; two bonds for one thousand dollars each, being executed, payable to Kinkle, and received by him in lieu of two of the notes held by Kinkle on Lehr: at the time of the sale, the complainant received from Lehr the title bond, which Kinkle had executed, with an indorsement thereon, by Lehr, by which he “insured” that the title should be made to Steele, according to the stipulation of the bond. At the time of the sale, Lehr did not disclose to the complainant, the existence of the mortgage, nor does it appear that he had any knowledge of it.

On the first January, 1839, the complainant offered to Kinkle to pay his note due at that time, and any balance remaining due of the first note of Lehr to Kinkle, and demanded a title, which Kinkle being unable to make, in consequence of the mortgage, he declared his intention to abandon the premises,

and rescind the contract, and did so accordingly; and the object of this bill is to have the contract rescinded, and the notes for the purchase money delivered up and cancelled.

It is not charged in the bill, that there was any unfair practice resorted to on the part of Lehr, to prevent the complainant from being apprised of the mortgage on the land, which it is stated in the answer of both defendants, had been duly recorded, and was a matter of general notoriety in the town of Huntsville, in which all the parties lived, and the question is, whether in a case like the present, the mere omission, on the part of Lehr, to state the fact of the existence of the mortgage, will in law, amount to fraud.

Where a vendor professes to be able to make a clear title in fee, either by a direct assertion to that effect, or while he offers to make such a title, by concealing the fact of his inability to do so, his conduct cannot be otherwise than fraudulent. It cannot be reconciled with fair dealing, because he knows at the time, that a disclosure of the truth of the case, would prevent the sale, and therefore in such a case, if the purchaser is not chargeable with negligence, the contract may be rescinded by him even before an eviction; as was held by this Court in the case of *Young v. Harris*, 2 Ala. Rep. See also *Edwards v. McLeay*, Cooper, 308.

Here, there was no charge that there was express fraud by false assertion, or any device resorted to, to put the complainant off his guard, and prevent inquiry into the true state of the title; nothing in short, existed which could be considered "industrious" concealment. The mere silence of Lehr, at the time of the sale, will not of itself, in our opinion, be a fraudulent concealment. A fraudulent concealment, is the failure to disclose a material fact, which the vendor knows himself, which he has a right to presume the person he is dealing with, is ignorant of, and of the existence of which the other party cannot, by ordinary diligence, become acquainted. Although fraud may be inferred from other facts, it is never presumed, and it would be the grossest injustice to infer fraud from the mere silence of a vendor of the existence of an incumbrance, where the abstract of the title was sufficient to put the purchaser on enquiry. In the case cited of *Edwards v. McLeay*, and which is one of the strongest in favor of relief to be found in the books:

stress is laid on the fact, that the defect of title, could not be collected from the abstract.

In this case, the complainant knew that the title was in Kinkle, and by inquiry, could have ascertained its condition; his failure to do so, is chargeable only on himself, and is a want of that common or ordinary diligence, which a Court of Chancery always requires, in cases like the present, before its aid can be obtained. In the case of *Young v. Harris* cited from 2 Ala. Rep. where there was a fraudulent concealment, the contract was rescinded, expressly on the ground that the purchaser could not by ordinary diligence, have discovered the defect of the title, and the same principle was again affirmed in the case of *Camp v. Camp*, 2 Ala. Rep.

It may be added, that a Court of Chancery will not impute fraud, when the facts and circumstances out of which it must arise, may consist with pure intentions; but to create such an imputation, the facts must be such, that they are not explicable on any other reasonable hypothesis. Yet, it is perfectly consistent with all the facts stated in the bill, that Lehr was acting with entire good faith.

By the original contract between Lehr and Kinkle, it was stipulated that the notes for the payment of the land, which became due in January, 1838, 1839 and 1840, might be discharged in the notes of solvent men in North Alabama. The case has been argued, as if these notes could be tendered at any time, and a title demanded; but it is very certain, that Kinkle stipulated to retain the title until the last period of time arrived, otherwise it might happen that the person whose notes was tendered, though solvent at the time, might not be so when the notes became due, yet the title was not to be made until the notes were paid and satisfied. This stipulation being for the benefit of Kinkle, he might waive, and it is insisted he has done so.

The allegations of the bill admitted by the answer, which are supposed to establish this proposition, are the following: "Your orator made a contract with said Lehr, whereby your orator purchased of him the parcel of ground aforesaid, with an express understanding, between said Lehr and your orator, that a good and clear fee simple title should be made thereof, to your orator, so soon as the notes made by said Lehr to said

Kinkle, for said ground, should be discharged as aforesaid, in pursuance of which the said Lehr, on the day and year last aforesaid, by his written instrument, signed by him on the back of said title bond, assigned the said title bond to your orator, as follows: I assign to G. M. Steele, the within bond, for a title, and all the benefits to which I am entitled under the same, and hereby insure that the title shall be made according to said bond, excepting that the same shall be made to said Steele.

“As part of the consideration of your orator's said purchase, and for the purpose of performing said Lehr's contract of purchase aforesaid, your orator, pursuant to an agreement between himself, said Kinkle, and said Lehr, to that effect, and in accordance with the terms of your orator's said purchase, executed his two writings, obligatory on the day and year last aforesaid, and bearing that date to said Kinkle, in payment of the two instalments from Lehr to Kinkle, which were payable according to the condition of the said title bond, on the 1st January, 1839, and 1840.”

There is certainly some ambiguity in the facts here stated, but a very slight examination will show, that it was not the intention of the parties, by this arrangement, to make any other change in the original contract, than to substitute the complainant for Lehr, in the purchase of the land—which arrangement was obviously intended for the security of the complainant; that no further charge in the original contract was contemplated by the parties, is evident, both by the assignment of the bond and the terms in which it is conceived. If, as now contended for, the delivery to Kinkle of the notes of the complainant, discharged the condition of the bond for title, why was the bond assigned to the complainant, and the benefits to be derived therefrom to Lehr, conveyed to the complainant? And especially, what propriety would there be in requiring Lehr to “insure” that the title would be made according to the bond? Certainly, all this imports that the title should be made in future, by the performance of the condition of the bond.

That condition was, to pay in notes of solvent men, in North Alabama, at stipulated periods of time. It is not necessary now to inquire, whether on the delivery of the last note to Kinkle, of a man then solvent, he would have been required immediately to make title, or whether the true meaning of the contract

is not, that the title was not to be made until the *solvency* of the makers of the notes was ascertained by payments, because, at all events, it is very certain that the meaning of the contract is, that the persons whose notes could thus be given in discharge of the contract, were to be solvent at the time they were due, and payable.

The bonds were executed by the complainant, on the 4th December, 1837, for the payment of one thousand dollars on the 1st January, 1839, and a like sum on the 1st January, 1840. If these bonds, as is now contended, were received in satisfaction of the obligation of Lehr, and thereby discharged the condition of the bond for title, Kinkle became himself the guarantor of the continuing solvency of the complainant. If there had been such a radical change as this, made in the contract originally entered into, it should have been stated explicitly and plainly, so that it could have been met and answered, and not left to doubtful and ambiguous interpretation. It was also incumbent on the complainant, to have explained the incongruity and inconsistency of the contract now set up with the fact of his taking an assignment of the title bond to Lehr, with the warranty of the latter, that the title would be made according to its terms.

The answers of both defendants, are opposed to any such construction of the contract. They both deny the ignorance of complainant, of the existence of the incumbrance which they say was matter of general notoriety in the place where all the parties lived, and was there recorded; and Kinkle says, that he refused to make title when demanded by the complainant, because *he was not bound to do so, until after payment of the whole amount due him*; language which is irreconcilable with the contract now set up by the complainant.

It appears that Kinkle is now able to make title to the lot, and tenders a title in his answer, but the view of the case here taken, renders it unnecessary to consider that, and other questions made at the bar. Let the decree of the Chancellor, dissolving the injunction, be affirmed.

LOGAN, ADM'R. V. BARCLAY.

1. A proceeding against a constable, by motion, for failing to make money upon an execution, when he could have done so by the use of due diligence, can not, after the death of the constable, pending the motion, be revived against the administrator; because the revival of the suit is not provided for by statute.

Writ of error to the Circuit Court of Coosa county.

THIS suit was commenced in the Circuit Court, against James M. Logan, by motion, setting forth that he, as constable, received two executions in favor of the plaintiff, against Martin L. Daniel, on which the said Logan failed to make the money, as required by the mandate of the executions, which he might have made by the use of due diligence. The notice of this motion is dated the 13th February, 1839, but there is nothing in the record showing any service.

At the March term, 1840, the death of the defendant was suggested, and a *sci. fa.* ordered to issue to John Logan, his administrator. This was executed on the administrator on the 4th of July, 1840, and on its return, he was made a party to the suit, and the cause continued.

At the next term, the plaintiff filed a suggestion, setting out the same cause of action as stated in the notice, and to this the administrator demurred. The Court overruled the demurrer, and the administrator then pleaded the statute of non-claim, setting out his appointment as administrator on the 21st October, 1839; that publication was made according to law, and that the demand was not presented to the administrator within eighteen months, as required by law.

The plaintiff demurred to this plea, and the Court sustained the demurrer. Issue was then joined on the suggestion, and a verdict returned for the plaintiff, on which judgment was rendered.

The defendant now prosecutes his writ of error, and insists that the Court erred in reviving the suit, it not surviving by law, and also in overruling the plea of non-claim.

MORRIS, for the plaintiff in error, relied on the want of any statute, authorising the revival of such a suit.

BAYLOR, contra, insisted that the securities of the constable would be liable for this misfeasance, and when a recovery was had by the plaintiff against them, they, in their turn, could have an action against the administrator. If such a result could be thus produced, no good reason could be given for not permitting the plaintiff at once, to go against the administrator.

GOLDTHWAITE, J.—The decision of the chief question involved in this case, is somewhat important, inasmuch as it will affect the course of proceeding in a large class of cases.—Motions for summary judgments, although they partake much of the character of suits, are unknown to the common law, and must therefore, be entirely governed by the several statutes which authorise this mode of procedure. The one which warrants the motion we are now considering, in addition to giving a new remedy for a common law liability, inflicts a penalty beyond it. If we were doubtful, with respect to the power of the Court to mould the practice so as to conform to the common law, in cases where no additional liability was superadded, we can have none, in such a case as this, because the plaintiff would not be entitled to the statutory penalty, if he pursued his remedy by the ordinary mode of suit. In most of these summary proceedings against officers for a neglect of duty, the plaintiff might have case or *assumpsit*, at his election, and if he elected the former mode of action, he would not be entitled to revive his suit, although he might so have brought his action as to proceed against an administrator.

So, likewise, it cannot admit of question, but the party plaintiff might pursue the sureties for the neglect of the principal, and they, in case of payment, would be entitled to indemnity from his estate.

Yet, none of these cases warrant the revival of suits unknown to the common law, and in the absence of particular statutory regulations, authorising such revival.

Hence we conclude, that there was error in making the administrator a party in this cause, by a revival of the suit.

This conclusion renders it unnecessary to examine the other point, respecting the plea of the statute of non-claim.

Let the judgment be reversed.

ESLAVA V. RIGEAUD.

1. A writ of error will not lie to revise an order quashing an attachment issued under the act of December, 1837, as ancillary to an action pending at law : and though the plaintiff recovers a judgment in the principal case, and sues out a writ of error to review it, the Court will not examine the order on the attachment. *Semble*, in such case, the plaintiff's remedy, if injured, is by *mandamus*.

This case comes here by appeal from the Circuit Court of Mobile.

IT appears from the record, that the plaintiff brought an action of covenant against the defendant, and another in the County Court of that county, for the recovery of a sum of money, which they had undertaken by deed to pay him as rent for the occupancy of a house. Pending this suit, and as ancillary to it, the plaintiff made an affidavit, that the defendant, Rigeaud, was "about to remove out of the State of Alabama, so that the ordinary process of law cannot be served on him," &c.; and having executed a bond in due form, an attachment issued accordingly. At the return term of the attachment, it was quashed by the County Court, on motion. From that decision the plaintiff appealed to the Circuit Court, and there the judgment quashing the attachment, was affirmed; and this last judgment is now complained of. It is admitted, that a judgment has been rendered in the principal case by the County Court, in favor of the plaintiff.

PECK, for the plaintiff in error.

GIBBONS, for the defendant.

COLLIER, C. J.—The eighth section of the act of December, 1837, enacts, that when a suit shall be commenced in any Circuit or County Court of this State, and the defendants, or any one or more of them, shall abscond or secrete him, her or themselves, or shall remove out of this State, or be about to remove out of this State, or shall be about to remove his, her or their property, out of this State, or be about to dispose of his, her or their property, fraudulently, with intent to avoid the payment of the debt, or demand sued for, on oath thereof being made by the plaintiff, his agent, attorney, or factor, &c. and bond executed with surety, &c. an attachment shall issue in favor of the plaintiff, against the estate of the defendant, returnable to the Court in which suit had been originally commenced. The attachment thus provided for, “shall be issued, executed and returned, as near as may be, in the same manner as original attachments, and the said affidavit and bond and attachment, when returned, shall be filed with the papers in the original suit, and shall constitute a part thereof, and the plaintiff in said suit, may proceed to judgment, as in other cases, and the original suit shall not be delayed.”

It is insisted by the plaintiff, that the attachment issued in this case, being in conformity to the act cited, was improperly quashed. Preliminary to the consideration of this argument, we will inquire whether the decision of the County Court is revisable on error. A writ of error lies from a sentence, judgment or decree, which definitively settles or determines the cause. *Clauson v. Shotwell*, 12 Johns. Rep. 31; *Beal v. Doughty*, 3 Binn. Rep. 432; *Boyle v. Zacharie & Turner*, 6 Peters, 648; *Rutherford v. Fisher*, 4 Dall. Rep. 22, and many decisions of this Court. An interlocutory judgment, if subject to correction by any other tribunal than that rendering it, must be operated upon by the aid of some other process.

The idea advanced by the plaintiff's counsel, that the attachment constituted a suit in itself, and the judgment quashing it, was final, is opposed to the express terms of the statute, which declare that it shall constitute a part of “the original suit.” It is then but assistant process given, to enable the plaintiff to make the action commenced by him, the more effectual. If a writ of error was allowed in such a case, it might, instead of advancing, greatly embarrass the administration of justice. If

the judgment in the principal case, was adverse to what the plaintiff considered his rights, he might prosecute a writ of error to review it; and thus, instead of one, there would be two causes, pending in the appellate Court at the same time, founded upon a single suit. Suppose the plaintiff should be successful in reversing the order on the attachment, but fail in showing the judgment in the action, to be erroneous, what would it avail him. The action being at an end, it is clear, he could not prosecute his attachment further. These reasons, in addition to the authority noticed, are sufficiently potent, to authorise a revising Court to repudiate a cause circumstanced as the present.

But even if the writ of error had been sued out to review the judgment in the action, the question, whether the order quashing the attachment was erroneous, could not be raised. That a party may prosecute a writ of error to reverse or correct a judgment in his favor, cannot be questioned, but the appellate Court in such a case, only inquires whether the plaintiff has been prejudiced, or in other words, whether the judgment is not imperfect, and fails to do him complete justice. A party suing upon a promissory note, or for the recovery of two specific articles of property, may complain, that he has not recovered all the interest to which he was entitled in the one case, or but one of the articles of property in the other. But, if the plaintiff has a verdict for all that he demands in the action, he can allege nothing further on error. It, however, by no means follows, if the plaintiff's attachment was improperly dismissed, that he is remediless. Superior Courts frequently award writs of *mandamus* to correct the acts of inferior jurisdiction, or to compel them to act where they refuse to proceed in obedience to law. And where there is no other appropriate common law remedy, such proceeding is frequently resorted to. *The People v. The Superior Court of N. York*, 10 Wend. Rep. 285; *ex parte Davenport*, 6 Peters' Rep. 661; *ex parte Bradstreet*, 7 Peters' Rep. 634; *ex parte Hoyt*, 13 Peters' Rep. 279; *Life and F. Ins. Co. of N. York v. Adams*, 9 Peters' Rep. 573; *Jones, ex parte*, 1 Ala. Rep. N. S. 15, and cases there cited.

From this view, it results that the writ of error from the County to the Circuit Court was improvidently issued, and should have been dismissed, but instead of thus disposing of

the case, the judgment of the former Court was affirmed. In this the Circuit Court erred, and its judgment is here reversed, and this Court proceeding to render such a judgment as should have been rendered by that Court, adjudges, that the writ of error from the County to the Circuit Court, be dismissed; that the defendants pay the costs of this Court, and the plaintiff, the costs of the Circuit Court.

CLARK'S ADM'RS V. STODDARD, MILLER & Co.

1. Where one of two partners, to a writ sued out against the firm, acknowledged service of the writ, thus—"I hereby acknowledge service of the within original writ, waiving copy; signed, Thomas S. Clark, one of the firm of Clark & Law"—held, that this was not an acknowledgment of service of the writ on behalf of the firm.
2. The voluntary appearance of an administrator, and consent to become a party to the suit, is an admission of record that his intestate was served with process.
3. The plaintiff may discontinue as to those partners on whom the writ is not served, and if the defendant served with process, die pending the suit, the action will survive against his representatives.
4. The want of a formal issue cannot be objected to, on error, when the record shows that the parties appeared and submitted their cause to a jury.

Error to the Circuit Court of Tallapoosa.

THIS action was *assumpsit* in the Court below, brought by the defendants in error against Thomas S. Clark and Augustus Law, partners, under the style of Clark & Law. The writ was acknowledged by Clark, thus: "I hereby acknowledge legal service of the within original writ, waiving copy writ." Signed, "Thomas S. Clark, one of the firm of Clark & Law." At a succeeding term of the Court, the suit was dismissed as to Law, and the death of Clark suggested, upon which the Court made an order, that a *scire facias* issue to the plaintiffs in error, adm'rs of Clark. At the next term, final judgment was thus entered.

"This day came the plaintiffs, by their attorney, and the death of the defendant, Thomas S. Clark. (who was served

with process) being suggested, and not denied, then comes Simeon Goldsby and Sarah Clark, adm'r and adm'x, of said Thomas S. Clark, and consent to become parties defendants to this suit. Thereupon came a jury, &c. who upon their oaths, do say, we, the jury, find for the plaintiffs, and assess their damage, &c. Therefore, it is considered, &c.

From this judgment, this writ of error is prosecuted. The assignments of error are,

1. Thomas Clark was not before the Court.
2. It was error to order a *sci. fa.*
3. It was error to make his adm'rs parties.
4. The cause was discontinued.
5. There was no issue to try.

T. CLAY, for plaintiff in error.

ORMOND, J.—An acknowledgment of the service of process, is sufficient, if shown, to have been made by the party.—The recital in the judgment, that Clark was served with process, would perhaps be sufficient to show that such proof was made, as the Court could not be certified of the fact, in any other mode. But in addition to this, we find that the adm'rs of Clark, came in and *consented* to become parties to the suit. This is an admission of record, that the process was served on their intestate, and disposes of the two first assignments of error.

By virtue of a statute of this State, when a writ issues against a firm, the service of the writ by the sheriff on one of the partners, will authorise him to return it, executed on all; or if he return the fact, that it was executed on one, it is an execution in law, on all the partners named in the writ.

At an early period in the history of this Court, in the case of Click and Morgan v. Click, Minor's Rep. 79, it was held, that an acknowledgment of service of the writ by one partner, was service on all. Without questioning that decision in the present case, we are of opinion, that in this case, the acknowledgment of service of the writ by Clark, was not intended by him as an acknowledgment in the name of, or on behalf of the firm. It is true, he calls himself one of the firm of Clark & Law, but the acknowledgement is expressly made for himself, individual-

ly, and cannot operate beyond that expressed intention. It becomes necessary, therefore, to consider whether the discontinuance of the suit as to Law, was a discontinuance of the action. This question has been decided by this Court, in the case of Earbee v. Evans & Carman, 1 Ala. Rep. 295, where it was held, that under our statute, a plaintiff might discontinue as to those partners on whom the writ was not served.

It is also objected that the suit could not be revived against the personal representatives of Clark. It might perhaps be considered that when the legislature authorized a suit against any member of a firm in his individual capacity, it would follow, that in the event of his death, pending the suit, it would survive against his representative. Whether this is a legitimate conclusion or not, we are satisfied, that under the equity of the act, "to amend judicial proceedings at common law, in regard to suits against co-partners," approved 1st February, 1839, the revival of this suit against the personal representatives of Clark, may be supported.

It remains but to inquire, whether the want of a formal issue, appearing in the record, will be available on error.

The current of decision in this Court, for some years past, has been to disregard those matters of form which do not affect the merits of the case, and which are in general, waived by the parties themselves in the Court below. When the parties appear, and submit their cause to a jury, we must presume, if no issue appears in the record, that it was waived by the parties; that the defendant having no defence to make, permitted judgment to pass without opposition.

Let the judgment be affirmed.

SANFORD, ADM'R V. WICKS.

1. To a plea of *non claim*, it is proper to reply, that the debts sued for were contracted in the states of Mississippi and Louisiana, as debts contracted out of the state are expressly prohibited from the operation of the statute.
2. To a plea of *plene administravit*, it is proper to reply that on a certain day before the commencement of the suit, and on divers days between that and the day of pleading the plea, defendant had assets in his hands sufficient to pay the debt; which he could and ought so to have applied.
3. When the verdict and judgment against an administrator are in the usual form, and issues appear on the pleas of *non assumpsit* and the statute of limitations, it is not error that the verdict does not show the amount of assets, although the plea of *plene administravit* is also pleaded, but no issue of fact on it framed to the jury, and the plea being disposed of on demurrer to the replication.

Writ of error to the Circuit Court of Mobile county.

ASSUMPSIT on a promissory note, with the common counts. The defendant pleaded *non assumpsit*, and the statute of limitations to the money counts; and the statute of *non claim* and *plene administravit* to all the counts. The plaintiff replied to the plea of the statute of limitations, that the cause of action accrued within six years next before the commencement of the suit; to the plea of the statute of *non claim*, that the debt sued for, was contracted in the States of Mississippi and Louisiana; and to the plea of *plene administravit*, that he exhibited his demand to the defendant as administrator, on the 28th day of April, 1836, at which time he had notice of the cause of action and demand, before the time of pleading his said plea; that on that day, and on divers other days between that and the day of pleading the said plea, divers goods and chattels, which were of the said intestate at the time of his death, of great value, to wit, of the value of the damages in the declaration mentioned, came to and were in the hands of the defendant as administrator, to be administered, wherewith he could and might, and ought to have satisfied the damages aforesaid; and that this he, the said plaintiff, was ready to verify, &c.

The defendant demurred to the replications to the pleas of *non claim* and *plene administravit*, which demurrers were

overruled. The plaintiff then discontinued his action as to the money counts, and thereupon came a jury, who being sworn to try the issue joined, returned a verdict for the plaintiff for \$411 29, for which judgement was rendered, to be levied *de bonis testatoris*, in the hands of the administrator, to be administered.

The defendant prosecutes this writ of error, and assigns, that the Court erred in overruling the demurrers to the plaintiff's replications to the pleas of *non claim* and *plene administravit*; and also, in rendering judgement on the verdict, inasmuch as it does not ascertain what amount of assets were in the hands of the defendant to be administered.

CAMPBELL, for the plaintiff in error, cited 1 Chitty's Plead. 574; 2 Wms. on Ex. 1209; Booth v. Armstrong, 2 Wash. 301; Rogers v. Chandler, 3 Mum. 66; Eppes v. Smith, 4 Mum. 466; Siglar v. Haywood, 8 Wheat. 675; Fairfax v. Fairfax, 5 Cranch, 19; Ewing v. Peters, 3 D. & E. 686.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—1. The statute of *non claim*, contains an express exception in favor of debts contracted out of the State. Aikin's Digest, 153, § 6. The replication sets out, that the debts sued for, were contracted in the States of Louisiana and Mississippi, and therefore, is a complete answer to the plea of *non claim*, within eighteen months.

2. The replication to the plea of *plene administravit* was, that the demand was exhibited to the defendant, at a day previous to the commencement of the suit, and that between that day and the day of pleading the plea, sufficient assets came to the defendant's hands, to be administered, wherewith he might and ought to have paid the plaintiff his damages. We can perceive no fault in this replication, as it is accordant with the most approved forms. The demurrers to the replications were therefore properly overruled.

3. The other question raised by the assignment of errors, must also be determined against the plaintiff in error, because there is no fault in the verdict or judgment. Whatever may be the proper verdict, when issue is taken on the replication to a plea of *plene administravit*, it is certain, from an inspection of

the pleadings in this case, that no such issue was ever made.—The defendant demurred to the replication, and when his demurrer was overruled, if he pleaded further, and to issue, the record does not disclose it. The verdict is well enough, under the issues which are shown, and we are not called on to presume another issue, to make the judgment erroneous.

The judgment is affirmed.

WILLIAMS V. HANEY.

1. The plaintiff claimed the slaves in question under a bill of sale which his wife's father had executed and delivered to her, previous to her marriage : the defendant claimed the slaves under the will of the father ; under the plea of the statute of limitations—*Held*, that it was allowable for the defendant to show the nature of the father's *possession*, and that it was *adverse* to the claim set up by the plaintiff.
2. And in such case, the will under which the defendant claims, was admissible evidence for the purpose of connecting her with the testator's possession.
3. Evidence is admissible which is pertinent to the issue, and which either alone, or in connection with something else serves to elucidate the matters controverted if the source from which it comes is unexceptionable.

Writ of error to the Circuit Court of Morgan.

The plaintiff in error, brought an action of detinue against the defendant, in the Circuit Court of Morgan, for the recovery of a female slave, named Caroline, and her children, Jenny and Amanda.

The defendant pleaded *Non detinet*, and the statute of limitations, in short, by consent, with leave, to give any available special matter in evidence, and on issues to these pleas, the cause was submitted to the jury. On the trial, the plaintiff excepted to the ruling of the Court. From the bill of exceptions, it appears by the testimony of one witness, that John Haney, the late husband of the defendant, executed and delivered a bill of sale, to his daughter Ruth, for the slave Caroline, in the year 1828 or '29 ; and at the same time delivered the slave to his daughter. Ruth lived with her father from the time of the

gift, until July, 1834, when she intermarried with the plaintiff, who, together with his wife, resided with her father until some time in the year 1835: the slave Caroline, remaining with John Haney, up to the period of his death, which occurred in 1838. After that event, she remained at his late residence, in the possession of the defendant, until this action was brought.

The defendant then introduced a witness, who testified that he was present at the time to which the foregoing testimony refers, and that neither the donee Ruth, or the slave, Caroline, was present; and that no delivery was made, either of the deed or slave, at that time.

The defendant next offered in evidence, the will of John Haney, dated, 10th day of April, 1838, and admitted to probate in the Orphans' Court of Morgan, on the 25th of February, 1839.

In the will, there is a clause in which the testator gives to his wife Keziah, together with other property, the slave Caroline, and her child Jane, (the younger child, Amanda, not being then born.) To the admission of the will as evidence, the plaintiff objected, but his objection was overruled, and the paper permitted to be read to the jury.

The defendant proved, by one of the executors of the will of John Haney, that in that character he delivered the slave Caroline, and children, to the defendant, pursuant to the provisions of the will. And she also proved by several witnesses, that Caroline continued in the testator's possession until his death, and appeared to be his property.

The bill of exceptions concludes as follows: "The Court admitted the will to be read, merely to show, under what title the defendant claimed, for the purpose of enabling her to connect her possession with that of her husband, the said John Haney, the testator, in pleading the statute of limitations, if there should be other evidence sufficient to sustain the plea. To all of which evidence, the plaintiff excepts, and prays the same to be signed, sealed and made a part of the record; which is done accordingly."

McCLUNG, for the plaintiff—contended, that the possession of the testator was not adverse to that of his daughter, or son-in-law, at least so long as they lived with him; but up to 1834, when she married, his possession was entirely consistent with

the title of his daughter, and after that event, up to 1835, the plaintiff must be considered to have had the actual possession of Caroline. If the retention of possession by the testator, be regarded as the assertion of a right of property, after the removal of the plaintiff from his house, the statute of limitations would not bar a recovery; for only about four years elapsed after that time, when suit was commenced.

HOPKINS, for the defendant—insisted, that the question arising upon the bill of exceptions was not whether the facts therein recited, were sufficient to sustain the statute of limitations, but it was, were they admissible under the issues. That they were competent evidence, he thought could not be disputed.

COLLIER, C. J.—The distinction between the admissibility and the sufficiency of evidence, is well established, and has been repeatedly recognised by this Court. Evidence which is pertinent to the issue, and which, in itself, or in connection with other proof, serves to elucidate the matter in controversy, is competent, if the sources from whence it comes, are unobjectionable.

The generality of the exception perhaps brings to our view, not only the correctness of the decision of the Circuit Court, in admitting the will of John Haney, but in allowing the witnesses for the defendant, to testify as to the apparent nature of his possession, and under this impression, we will consider the case. The defendant interposed two pleas; by the first, she denied that she detained the slaves in controversy, to the prejudice of the plaintiffs; by the second, she insisted that if she thus detained them, the statute of limitations barred the action for their recovery. These pleas, threw upon the plaintiff, the *onus* of shewing, *prima facie*, that the slaves were his, and that they were detained by the defendant. He introduced proof tending to show his title, and the detention; and also, that the testator did not hold the slaves adversely, up to 1835. To repel the inferences, deducible from the plaintiff's evidence, it was certainly allowable, for the defendant to prove the character of her testator's possession, and thus repel the notion, that a gift was made, or if made, show that the donor had disavowed it, and in respect to the subject of the gift, had placed himself in a position, antagonistical to the plaintiff. This was evidently the scope and

design of all her testimony. The facts proved on her part, were then admissible, and we think the sources of her proof, were unexceptionable. The statements of individuals, as to the nature of the testator's possession, and the employment of the slaves, were, perhaps, the only means by which an adverse claim could be shown; be this as it may, they were certainly proper testimony.

In respect to the will, it was admissible for the defendant to show that her husband, (the supposed donor,) had bequeathed to her, all the right that he had to the slaves in question. The Court did not allow it to go to the jury as proof in itself, of her title, but restricted its admission to the sole purpose of connecting her possession with that of her deceased husband, that she might defend herself under the statute of limitations, if she could adduce sufficient evidence to sustain that plea.

The question, as to the sufficiency of the evidence, does not arise upon the record. If the plaintiff had desired to bring up that question, he should have moved the Circuit Judge, to instruct the jury on such points as he deemed material, and if dissatisfied with any charge given or refused, he could have excepted, and had the opinion of this Court on his exceptions. But in the aspect in which the case is presented, it is a mere question of the admissibility of evidence. And having shown that there is no error, the judgment of the Circuit Court is affirmed.

CLAY, *et al.* v. DENNIS, USE, &c.

1. A plea averring that the note in suit was given for an interest in two lots in the town of Dadeville—that the lots were in the first instance purchased by one W, the condition of the sale to him being that the title was not to be made until the payment of the purchase money—that W died without making full payment;—that with a knowledge of these facts, the plaintiff fraudulently sold the lots to the defendant, and can not make, or obtain to be made, a title therefor; and that the defendant has not now, and never had, possession of the lots: held to be bad, 1. Because a plea alledging fraud, must show in what the fraud consists; and the facts stated in the plea are no evidence of a fraudulent intention. 2. When the contract is still subsisting, it is no defence to an action for the purchase money that the defendant is not in possession of the land. 3. While the contract remains in force, it is no defence to an action at law, for the purchase money, that the vendor can not make a title, as he is responsible on his covenant for failing to make title.

Error to the Circuit Court of Tallapoosa.

TO an action of debt on promissory note, brought by the defendant in error, in the Court below, the plaintiff in error pleaded, that the note on which the action was founded, was given for the north halves of two lots, in the town of Dadeville; that said lots were purchased from the Commissioners of Dadeville, by one John C. Webb, and as a consideration of the sale, the payment for said lots was to be made before they could be obtained from the Commissioners; that the plaintiff, who purchased the lots from Webb, well knew at the time he sold said lots to defendant, that Webb had not made payment to the Commissioners, and he also knew the condition which required such payment, before a title could be obtained—that said Webb nor any one for him, has ever made the full payment for said lots, and that said Webb is now dead; that nevertheless, said plaintiff fraudulently sold said lots to the said defendant, and cannot make, or obtain to be made, a title therefor; and that the said defendant has not, nor ever had the possession of said lots, and this, &c.

To this plea, the plaintiff demurred, and the Court sustained the demurrer, and defendant declining to plead over, the Court rendered judgment for the plaintiff, from which this writ is prosecuted.

The error assigned is the judgment on the demurrer.

CLAY & HEYDENFLDT, for plaintiff in error—insisted, that none of the decisions heretofore made on the point raised in this case, apply here, because the plaintiff in error was never in possession of the lots which were the consideration of the note sued on; and also, because the plea alleges that the sale was made fraudulently.

PRYOR, *contra*—insisted, that the plea was bad:

1. Because it did not aver that the title to the lots was in the Commissioners.

2. Because it is argumentative, in not stating positively, that plaintiff, Dennis, bought from Webb.

3. In not stating the value of the interest which Webb bought, and which Dennis sold, &c.

4. The plea does not aver that the estate of Webb, is insolvent.

5. It does not aver that Webb had not made all the payments on the lots which were due at the time of plea pleaded.

6. It does not aver that Webb did not execute a bond with covenants conditioned to convey, or deed with covenants, &c. which would endemnify the defendants, if title were not made.

7. The charge of fraud, without alleging in what it consists, is not sufficient.

ORMOND, J.—We understand the plea, to state in substance, that the note in suit, was given for an interest in two lots in the town of Dadeville; that the lots were, in the first instance, purchased from the Commissioners of the town, by one Webb, the condition of the sale to him being, that the title was not to be made, until the payment of the purchase money, and that full payment has not been made by Webb, who is now dead: that with a knowledge of these facts, the plaintiff *fraudulently* sold the lots to the defendant, and cannot make, or obtain to be made a title therefor, and that the defendant has not now, and never had possession of the lots.

It is not stated, that the contracts for the sale of these lots from the Commissioners to Webb, from Webb to the plaintiff, and from him to the defendant, were not in writing, and waiving the consideration of the question, whether they should not

have been set forth, that the Court might judge of their validity, we must at least assume that these several contracts were binding on the parties, as the plea must be construed most strongly against the pleader.

There was then a contract between these parties, and the defendant must show, to be absolved from it, either that he has performed it, or that he is excused from its performance. The former is not pretended, but the latter appears to have been considered by the pleader, as a consequence of the allegation, that the plaintiff could not perform the contract on his part. This might have been sufficient to authorise the defendant to rescind the contract, if on his offer to perform it on his part, the plaintiff had refused, as was held by this Court, in *Clemens v. Loggins*, 1 Ala. Rep. 622, and in *Stone v. Gover*, *ibid*, 287; but until this is done, the contract is in force, and binding on both.

Great stress is laid by the counsel for the plaintiff in error, upon the allegation, that the defendant never had possession of the lots, and it appears to have been supposed, that therefore, he could repudiate the contract at his pleasure; but such is not the law. If indeed, possession had been taken and held, that alone would be conclusive to show that the contract was still in force, but it by no means follows, that the omission to take possession, or the mere abandonment of it afterwards, is evidence that the contract has been rescinded. See, *Clemens & Loggins*, above cited, and *Young v. Triplett*, 5 *Littell*, 247.

The principal reliance appears to have been on the allegation, that the sale was fraudulently made by the plaintiff. It has been decided at the present term, in the case of *Giles v. Williams*, that a plea alleging fraud, must state the facts which constituted the fraud. There are no facts stated in this plea, which are not consistent with entire good faith on the part of the plaintiff below. The omission to state the fact that, Webb, the first purchaser, was not to receive a title, until all the purchase money was paid, is no evidence of a fraudulent intent; as it must be unimportant to the defendant, whether the amount still due, is paid by the estate of Webb, or by the plaintiff himself, who must have stipulated to make title to the defendant, and cannot do so, without discharging the debt due the company, if not paid by Webb.

It is also alleged that the plaintiff cannot make, or cause to be made to the defendant, a title to the lots, but no fact is shown supporting this conclusion. It appears that a part of the original purchase money is still due to the town commissioners, but upon the payment of this they will certainly be compelled to convey the title; at least such must be the presumption, until the contrary is shewn.

But if such was the fact, it would not be a defence in a Court of law, in a suit to recover the purchase money, the contract for the sale of the land still subsisting, and the vendor, therefore liable on his covenants. The remedy, in such a case, must be on the counter contract of the vendor, or in a proper case must be sought in a Court of Chancery. See the case of *Young v. Triplett*, 5 Littell, 247.

Let the judgment be affirmed.

THE STATE V. CLARKSON.

1. The certificate of the officers selecting grand juries, under the act of 1836, is a record which cannot be impeached by evidence showing that it was not signed by the clerk whose name appears to it; or by showing that he was not present when the duties were performed.
2. If such certificate shows that the grand jurors were drawn by lot, this is proper evidence to support an issue that the grand jurors were drawn by lot, instead of being selected, as provided for by the act of 1836.
3. An indictment found among the files of the Court, and recognized as an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the same indictment; and on such an issue no evidence need be produced to sustain the affirmative.

Question reserved by the Circuit Court of Mobile county.

THE defendant was indicted at the special Term of the Circuit Court of Mobile county, held in February, 1841, for keeping and exhibiting a faro-bank. He pleaded in abatement of the indictment, as follows:

1. That the indictment was not preferred to, nor was the

same inquired of, and a true bill found thereon, by a grand jury of good and lawful men, free-holders and house-holders, summoned and returned, or elected, impannelled, charged and sworn, agreeable to law, &c.

2. That the said indictment was not found, &c. agreeably to the laws of the land, in this to wit: that it was not submitted to, inquired of, nor was a true bill found thereon, by a grand jury composed of free-holders and house-holders, at the time when a list of persons, qualified to act as jurors was returned to the clerk of the Circuit Court of Mobile county, by the sheriff of the said county; nor by a grand jury, selected in the manner required by law, from the list of free-holders and house-holders, returnable to the clerk of the Circuit Court of Mobile county, by the sheriff of said county.

3. That the said indictment was not found by a grand jury of good and lawful men, so held in the manner required by law, in this, to wit: that the same was found by a body of men, drawn as a grand jury, without the presence and action and concurrence of the clerk of the Circuit Court of Mobile county, as required by law.

4. Same as the last, but alleging the special ground, that the grand jury, instead of being *selected* from the whole number of free-holders and house-holders, were *drawn by lot*.

5. That one of the grand jurors by whom the bill was found, to wit, Phillip McLoskey, was not a citizen of the United States.

6. That one of the grand jurors, to wit, Henry Chamberlain, was more than sixty years of age.

7. That the bill of indictment was not found and returned into Court, by a grand jury of said Court, according to the forms of law.

8. That the said bill of indictment was not found by a grand jury composed of the legal number required by law.

Issues were joined on all these pleas.

The defendant offered in evidence, in support of his pleas, the book containing the minutes of the Court, on the first page of which, was an entry of the proceedings had in the Court in these words:

Circuit Court, Mobile County.

CLERK'S OFFICE, 8th September, 1840.

This day, to wit, the 8th day of September, 1840, the sheriff of Mobile county, furnished to the clerk of said Court, a list of free-holders and house-holders of the county of Mobile, which is filed in the office of the said clerk; and the said clerk having given notice to the Judge of the County Court to appear at the clerk's office of the said Circuit Court on this day, to select from such list, such persons, as were by law deemed qualified to serve as jurors.

On the same day, the Judge of the County Court of Mobile county, the sheriff of said county, and the Clerk of the Circuit Court did attend and select from said list, such persons as were deemed qualified to serve as jurors; and the names of those selected are now put by them into the box, kept by the said clerk for that purpose, and on this day, as aforesaid, the Judge, sheriff and clerk, as aforesaid, proceeded to draw from the jury box, the names of twenty-five persons to serve, as grand jurors at the term of the said Court, to be held on the first Monday after the fourth Monday of October next, A. D. 1840; and the said names being drawn, the clerk issued a *venire facias*, directing the sheriff to summon the persons drawn, to attend as grand jurors at the Court aforesaid. Which writ is in the words and figures following.

Then follows the writ and afterwards the relation of the proceedings had with respect to the drawing of the names of the petty jurors.

Then follows a certificate that in testimony of the foregoing drawing, the said judge, sheriff and clerk had thereunto set their hands and seals. This purports to be signed and sealed by the said officers.

It was proved, that although these proceedings were bound up with the minutes of the Court, they were never read in Court as a part of its minutes; nor was it the habit of the clerk so to read them; that the minutes of the Court were kept on loose sheets, and that after the adjournment of the Court, the minutes of the proceedings in the clerk's office, and the minutes of the Court, were bound together in the book produced. The minutes of the Court for which the grand jury was selected, was not signed by the Judge who held the Court.

It was also proved, that the proceedings above referred to, were not signed by M. J. McRae, clerk of the Circuit Court for Mobile county, but his name and the seal affixed thereto, were written by Thomas G. Hamilton, a young man employed in said clerk's office, who was the person present for the clerk at the drawing of the grand jury; that Hamilton was not sworn according to the provisions of the act of 1837, and that he never had taken any oath for the performance of his duties. It was also proved, that the said McRae, was not present at the said drawing of the grand jury.

It was proved, that the only evidence on the records of the Court, showing that the bill of indictment was found or returned into Court, was the entry of the foreman's name on the indictment, and the following entry upon the minutes: "The grand jury, (naming twelve persons,) impannelled, sworn and charged as aforesaid, having retired from the Court, under the charge of a bailiff, now return into Court and present the following indictment, to wit:

Callet Roux, Faro—a true bill.

Henry Clarkson, " " " "

(Naming several others.)

The defendant also proved, that the said bill of indictment was considered of found, and returned into Court, by twelve only of the grand jurors, although the grand jury impannelled for the term, consisted of fourteen members.

The State proved by the clerk, that the bill of indictment was returned by the grand jury into Court, but offered no other evidence.

On this state of proof, the defendant's counsel made the following points:

1. That the record of the proceedings relating to the grand jury, showed that it was drawn by lot, and not selected, as required by law.

2. That the duties imposed by law on the Judge of the County Court, sheriff, and clerk, are judicial, and therefore that the clerk could not act therein by deputy, much less by a mere employee, who has never been sworn according to law, or qualified by any oath whatever.

3. That there was no evidence on record, that the bill of indictment had been returned into Court by the grand jury;

and that oral testimony of the clerk, or his deputy, was not sufficient to establish this point.

4. That there can be no legal grand jury, composed of less than thirteen persons; and although twelve may be sufficient to concur, it requires thirteen to consider of the bill and return it.

The Court overruled each of these points, and charged the jury, that the law was directly against the defendant in every particular, but reserved the questions as novel and difficult for the decision of the Supreme Court.

J. GAYLE, Jr. for the defendant.

THE ATTORNEY GENERAL, contra.

GOLDTHWAITE, J.—1. It appears from the statement of pleadings, and facts connected with the questions referred, that three distinct classes of defences, were at issue before the jury. The first of which, denies that the indictment was found by a grand jury constituted in conformity with the requisitions of the act of 1836; Aikin's Digest, 624. The second relates exclusively to the disqualification of individual jurors. And the third, asserts that the indictment was neither found by a grand jury consisting of the requisite number of jurors, nor returned into Court, according to the forms of law.

The sufficiency of these defences to abate the indictment, is virtually admitted by the joinder of issue to the count, and the only matter before the Court was, as to the competency of the evidence, and its effect in proving the issues. We are thus precise in stating the true question, because it might otherwise be inferred that we had examined these pleas with respect to their legal sufficiency.

In the case of *The State v. Allen*, 1 Ala. Rep. N. S. 442, we had occasion to examine questions very similar, and presented in the same manner. We then held, that it was not competent to impeach the certificate made by the officers, whose duty it is, under the act of 1836, to select the grand juries. Under the influence of this decision, it was entirely proper for the Circuit Court to have excluded all the evidence, that in point of fact, the certificate was not signed by the clerk; and that which shewed that another acted for him when the jury was selected, because the certificate had been

made, returned and acted on by the proper Court, and therefore was, for all purposes, a portion of its records.

2. But the certificate, when produced, conclusively showed that the requirements of the statute had not been pursued. The jurors, instead of being *selected*, were *drawn* by lot; thus bringing the issue within the decision of this Court; in the case of *The State v. Williams*, 5 Porter, 130. The fourth plea of the defendant, asserts the precise fact disclosed by the record in evidence, and we think the Court erred in charging the jury, as we must presume it did, that the issue ought to be found against the defendant.

3. No evidence was before the jury, to sustain the second class of pleas, and we have just decided in *William's* case, that twelve members may constitute a grand jury if a larger number is at first impanelled. Nothing then remains to be examined but the evidence offered to support the issue on the seventh plea. The fact to be proved, or rather disproved, was the authenticity of the indictment, as a record of the Court. There always is, and necessarily must be, a period in the progress of every prosecution, when the indictment is *in freri*, and we are not aware that any entry made in it, or upon the minutes by the clerk is necessary to give it effect as a record. Indeed the very fact of pleading to it, admits its genuineness as a record. This question has never before been the subject of an issue before the jury, but it has on several occasions received the consideration of the Court in other respects, and we have nothing to add to the reasons given in those cases. *The State v. Greenwood*, 5 Porter, 447; *The State v. Matthews*, 9 Porter, 370.

For the error we have already noticed, the judgment is reversed, and the cause remanded.

COOKE VS FARINHOLT.

1. Damages equal to the statute rate of interest, are recoverable upon a sum of money due for the *use and occupation* of a house, &c.

THIS was an action of *assumpsit*, in the Circuit Court of Marengo, by the defendant in error, against the plaintiff, to recover four hundred and forty-six 56-100 dollars, for the use and occupation of a house in the town of Demopolis. There is no plea in the record, but the cause was submitted to a jury as on issues joined, who returned a verdict for the plaintiff below, for four hundred and ninety-four dollars and forty-eight cents, on which a judgment was rendered.

On the trial, the defendant excepted to the charges of the presiding Judge, to the jury, and to the refusal to charge as prayed.

From the bill of exceptions it appears, that evidence was offered by the plaintiff, tending to prove his cause of action; but no evidence was adduced, of any contract to pay interest on plaintiff's demand after it became due, or of any custom by which the parties may have been supposed to contract in reference to the interest of the amount due.

The Court charged the jury, that although there was no contract between the parties to pay interest after the plaintiff's demand appeared to be due, nor any evidence of a custom, in reference to the payment of interest on such accounts, yet the jury might, in their discretion, allow interest after the rent became due.

The defendant's counsel prayed the Court to charge the jury, that interest upon accounts were regulated by law, and did not rest in the discretion of the jury; but the Court refused thus to charge, and instructed the jury that it was a matter in their discretion, to give interest or not, after the plaintiff's demand became due: and the jury returned a verdict for the sum claimed, with interest.

To review the judgment of the Circuit Court, the defendant has sued a writ of error to this Court.

PECK & CLARK for the plaintiff in error—insisted that it did not appear there was any contract to pay a sum certain on a certain day, for the use and occupation of the house, and no interest was recoverable, or if any, it could only be calculated from the date of the writ. If this view is correct, the Circuit Judge erred in his charge. *Marr's ex'ors vs. Southwick, et al.* 2 Porter's Rep. 375, '6; *Moore vs. Patton, Donegan & Co.*, 2 Porter's Rep. 451, and the cases there cited.

HUNTINGTON, for the defendant, contended, that where a debt, arising out of a contract, which does not carry interest, is wrongfully withheld, the jury may allow interest in the shape of damages—3 Bing. Rep. 353; 3 Camp. Rep. 258; 13 East's R. 98; 1 ib. 400; 2 Bos. & Pul. Rep. 337; 2 Wm. Bla. R. 761; 3 Wils. Rep. 205; 3 Cowp. R. 468.

In Pennsylvania, interest is recoverable for money had and received, on money paid by mistake after re-payment demanded. 9 Sergt. & R. Rep. 409. Also, on a policy of insurance,—for work and labor done—on rent from the time it falls due—on an open account, where a certain time is fixed for payment—and generally, in all cases where one person detains money belonging to another. 6 Binney's Rep. 488.

COLLIER, C. J.—In the first count of the declaration, the plaintiff alleges, that on the first day of January, 1840, the defendant was indebted to him in the sum of four hundred and forty-five dollars and fifty-six cents; and it is stated in the bill of exceptions that the plaintiff offered evidence tending to prove his cause of action. Now, although it was not indispensable to prove an indebtedness on the precise day alleged, yet if necessary to sustain the judgment, it may be presumed that the sum demanded was due at the time stated. In this view of the case, the charge of the Circuit Judge is fully sustained by the decision of this Court, in *Moore vs. Patton, Donegan & Co.* 2 Porter's Rep. 451. In that case, the Court say—"It is a rule founded in justice, that when a man has been kept out of his money, he should be allowed a reasonable compensation for its use."

In the case of *Crawford vs. The ex'ors of Simonton*—7 Porter's Rep. 110—we held, that although the statute, in some cases, gave interest, *eo nomine*, to the creditor, it did not neces-

sarily follow, that in cases not within the statute, he was not entitled to damages for a delay of payment as a substitute for interest ; but in such cases the statute rate of interest must be considered as the value of the use of money, and furnish a rule by which to admeasure the damages for its detention. It is further said, " that the allowance of interest, except upon the particular liabilities embraced by statute, must depend upon the circumstances of the case. To avoid its payment, it is competent for a defendant to show that he is not in fault in the non-payment of the principal sum ; as, that the plaintiff had been absent from the country, without having left a known agent, &c. But if the defendant offers no excuse for his delay, the plaintiff is entitled to recover interest as damages." This case was decided upon a review of many English and American adjudications on the point, and we think is a direct authority to show that damages, equal to the statute rate of interest, are recoverable upon a sum of money due for use and occupation. This view renders it unnecessary to consider whether the present case comes within the statute.

There is then, no error, either in the charges given to the jury, or in that refused, unless it be in having submitted it to their discretion, to allow or refuse interest where no excuse had been offered for the non-payment of the plaintiff's demand ; but if in that there be error, it was for the defendant's benefit, and he can not complain.

It remains but to add, the judgment must be affirmed.

MOCK v. KELLY.

1. To constitute a conditional contract with a physician, that if he did not cure the patient, he was to receive no compensation, it is not necessary that a specific price should be agreed on. A contract, that if he cured, he should be entitled to a reasonable compensation, is valid, and will be enforced.
2. One not a physician, can not be called on as a witness, to express his opinion of the value of medical services rendered to a sick person. Nor will it make any difference, that a competent witness had previously, in his hearing, expressed his opinion of the value of the services rendered.

Error to the County Court of Lowndes.

ASSUMPSIT in the Court below, by the defendant, against the plaintiff in error, to recover the value of medical services.

On the trial, a witness proved that he heard the plaintiff say to defendant, that he believed he could cure defendant's negro; whereupon defendant replied, that if he would cure her, he would give plaintiff a reasonable compensation; and plaintiff then said, in order to cure her, he must have her at Hayneville, whither she was sent, and died soon after her return, of dropsey, the same disease, apparently, which she had when she went into plaintiff's possession. The defendant's counsel then moved the Court to charge the jury, that if the contract between the plaintiff and defendant was, that if the negro was cured by the plaintiff, that then the defendant was to give him a reasonable compensation; that he was entitled to nothing without curing the negro.

The Court refused to give this charge, and charged the jury, that to make a special contract, a specified price must be agreed on, and that if they were of opinion, from the testimony that a special contract had been made, and that the defendant was to pay nothing unless his negro was cured, but was to pay a specific price if she was cured—and she was not cured; the law was with the defendant, if the reverse, with the plaintiff; and it was their duty to say how much he was entitled to, if any thing.

The plaintiff introduced a witness, who was not a physician, to prove the reasonableness of the charges, who knew nothing

of the facts, except what he had understood from a previous witness, a Thompsonian physician, who never practised out of his own family, and did not know the facts of the case, having previously proved the charges reasonable.

To the charge so given and refused, and to the introduction of the witness as above, the defendant's counsel excepted, and now assigns the same here for error.

BOLLING, for plaintiff in error.

COOK, contra.

ORMOND, J.—The charge of the Court below, is founded on the supposition, that a contract cannot be made with a physician, to pay him a reasonable price, if he cures a disease of which the patient is laboring, and nothing, if he fails; but that to constitute such a contract, a specific price must be agreed on. It is true, such contracts are rarely made, without a specific price being agreed on, and that higher than the ordinary rate of charging in such cases—the physician being in such a case, an insurer—but it is impossible to doubt that such a contract may be made, and that both parties would be bound by it. The inducement on the part of the physician to make such a contract, might be his desire to obtain employment, which he could not otherwise get, or it might proceed from his confidence in his ability to cure the case. But, be the inducement or motive what it might, if he makes such a contract, he is bound by it.

The Court also erred, in permitting the witness, who was not a physician, to prove the value of the services rendered. The exception to the rule, that facts only can be given in evidence, exists alone in those cases where the fact to be ascertained is not referable to any certain data, but must, of necessity, rest in opinion merely. The value of the medical services rendered in this case, comes within the exception; and to ascertain it, resort must be had to those who, from their skill in such matters, are qualified to decide. But the witness in this case, does not appear to have had the necessary qualification to entitle his opinions to any weight; and, therefore, being of no value as evidence, should not have been received.

It is stated in the record, that a *Thompsonian* physician,

who never practiced out of his own family, but who did not, of his own knowledge, know the facts of the case, had previously to this witness, proved the reasonableness of the charge. As this witness was not excepted to, we express no opinion upon his competency. Supposing him to be competent, it would not remove the objection to the admission of this witness; it is impossible to say on which testimony the verdict was found.

Let the judgment be reversed, and the cause remanded.

NORMAN V. NORMAN.

1. The functions of an executor do not necessarily cease with the final settlement of the estate, either with the Orphans' Court, or with the devisees or distributees.

Writ of error to the County Court of Dallas county.

ASSUMPSIT on a promissory note. The plaintiff describes himself in his declaration, as the executor of the last will and testament of Jesse Norman, deceased, and the note is described as payable to him, with the description of executor of the estate of Jesse Norman. The defendant pleaded *non assumpsit*, accord and satisfaction, payment and set-off. Verdict and judgment thereon, for the plaintiff.

A bill of exceptions was sealed at the trial, which states, "it being in evidence by parol proof, that the estate of the testator had been settled before the commencement of this suit; the Court charged the jury, that proof of settlement could only be shewn by written evidence from the Court, in which the plaintiff qualified as executor. This charge is now assigned as error.

GEO. W. GAYLE, for the plaintiff in error.

EDWARDS, contra.

GOLDTHWAITE, J.—We do not perceive how the charge given is involved in this case, and for any thing which is disclosed by the record, it appears to be entirely abstract.

But independent of this, we consider the Court might have gone much farther, and have instructed the jury, in a case where such an inquiry was important, that the functions of an executor do not necessarily cease upon his final settlement, either with the Orphans' Court, or with the devisees or distributees of the estate. It may be, and frequently is, important, that the functions of the executor should remain, although a settlement of the estate is made with those entitled to distribution.—The instances of suits in the name of the executor, for the benefit of other persons, to whom choses in action may have been delivered, without any assignment enabling the holders to sue in their own names, are sufficient to show that it is oftentimes necessary to use the name of the executor, although the estate is settled.

Let the judgment be affirmed.

DANSBY V. JOHNSON, USE OF GRESHAM.

1. Where an attachment is sued out under the act of 1837, as ancillary to an action at law, the irregularity of the attachment or proceedings on it, will not authorise the reversal of the judgment in the action.
2. And where, in such case, the record contained the entry of a judgment in favor of the plaintiff, it will be considered as having been rendered in the suit, and not on the assistant process.
3. If the replevy bond executed on the levy of the attachment, can not, on being returned forfeited, have the effect of a judgment, an execution issued thereupon will be superseded, or enjoined, according as the objection may be.

Writ of error to the Circuit Court of Marengo.

THE defendant in error brought an action of *assumpsit* for the use of Gresham against the plaintiff, on a promissory note, for the payment of twenty-four hundred and sixteen 72-100

dollars, with interest. Pending the cause, Gresham sued out an attachment in his own name, as ancillary to the action on the note. The judgment entry, without being preceded by a statement of the parties names, merely recites that the parties came by their attorneys, that the jury found the issues in favor of the plaintiff, &c. and then follows the judgment in conformity to the verdict.

To revise this judgment, the defendant has sued a writ of error to this Court.

HUNTINGTON for the plaintiff in error, insisted, that the act of the 23d Dec. 1837, authorised the issuance of an ancillary attachment, and declares that the replevy bond shall have the force and effect of a judgment if the plaintiff succeeds in the action, and the defendant fails to perform its condition. But in whose name shall execution issue in the present case? The replevy bond is to Gresham, and the judgment of the Court is in favor of the plaintiff—if both are allowed to operate, the defendant's property may be subjected to two executions, one at the suit of Gresham, and the other in favor of Johnson. Such a state of things cannot be allowed, and the judgment is defective for uncertainty.

PECK & CLARK, for the defendant, argued, that the proceedings on the attachment might be placed entirely out of view, and this being done, the judgment was unobjectionable.

COLLIER, C. J.—The act of 1837, which provides for the issuance of an attachment in certain cases, as ancillary to an action already commenced, was intended to provide an additional means for the security of the creditor. The irregularity of the attachment, or the proceedings upon it, cannot affect the plaintiff, if his suit has in other respects, been regularly prosecuted to judgment. It is entirely competent for him to renounce all the benefit which might have been derived from the attachment, and replevy bond, and take the chances of satisfying his judgment by executing such property of the debtor as may be found. This being the law, the question is, can an execution be issued on the judgment at the suit of the plaintiff below? Although there is no statement of the names of the par-

ties in connection with the entry of judgment, yet we think it clear, that the recitals contained in it, must be held to refer to the cause as then pending in the Circuit Court; the contrary supposition proceeds upon the idea that the attachment, instead of being assistant process, was in itself a distinct suit—an idea, as we have already seen, not well founded.

If the replevy bond executed upon the levy of the attachment, cannot have the effect (upon being returned *forfeited*) of a judgment, so as to warrant the issuance of an execution, the law will afford to the obligors an ample protection, either by superseding or injoining it.

The judgment is free from error, and consequently affirmed.

BABCOCK & BEENE V. HERBERT.

1. A public ferryman who, according to the statute of this State, has given bond, is a common carrier.
2. A license to keep a public ferry, on a navigable river, does not authorize the grantee of the ferry to place any obstruction across the stream on which the ferry is situated; and therefore, where a rope was stretched across a river to pull the ferry boat over, the owner of the ferry was held responsible for an injury arising from that cause.

Error to the Circuit Court of Dallas.

THIS was an action on the case in the Court below, by the defendant in error against the plaintiffs in error.

The declaration contains four counts. The first and second counts charge the defendants as public ferry-men, and common carries, with the loss of a sulkey, the property of the plaintiffs. The third and fourth counts, are as follows.

And for that, whereas, also, the said plaintiff heretofore, &c. was lawfully possessed of a certain other sulkey, of the value of two hundred and fifty dollars, and the defendants were also, then and there possessed of a certain other ferry-flat, used to run across the said Cahawba river, at the place aforesaid, for the

purposes aforesaid, which said ferry-flat of the said defendant's, was then and there under the care, government and direction, of three servants of the said defendants, who were then and there conveying the same across the river at the place appointed, to wit, from the opposite side of the river to the side on which the town is situated, in the usual manner, having received the certain other sulkey of the plaintiff, to be ferried across said river as aforesaid. Nevertheless, the said defendants, then and there, by their servants, so carelessly and improperly managed, governed and directed said ferry-flat containing said sulkey, to be ferried and conveyed across said river, that by and through the carelessness, negligence, unskilfulness and improper conduct of the defendants, by their servants, the said sulkey was cast and thrown overboard, into the said river, and lost and destroyed, &c.

And for that, whereas, also, the said defendants, before and at the time of the committing of the grievances hereinafter mentioned, were possessed of a certain ferry, situated and being in Dallas county, called the Cahawba ferry, being across the Cahawba river, and were also possessed of a certain other ferry below the Cahawba ferry, in said county, called the Alabama ferry, being the ferry across the Alabama river, both of which are public ferries, for all persons to go, return, pass and repass, with carriages, gigs, horses, &c. to wit, at the county aforesaid. Yet, said defendants, while so possessed of said ferries, to wit, at &c. wrongfully and unjustly placed and stretched a rope across the said Alabama river, at the said Alabama ferry, and immediately below the said Cahawba ferry, and wrongfully kept and continued the same, so placed and stretched across the said Alabama river, by means whereof, and in consequence of which negligent and improper conduct of the said defendants in that respect, afterwards, to wit, on, &c. at &c. a certain other sulky of the plaintiff, of great value, to wit, &c. then and there going and passing across said Cahawba ferry, in the ferry-flat, a boat of said defendants, was carried by the current of the Cahawba, down the stream, until it struck the said rope stretched across the Alabama river, as aforesaid, and was thereby thrown from said ferry-flat, into the river, and wholly lost to said plaintiff, at, to wit, &c. to his damage, &c.

The defendants demurred to each of the counts of the decla-

ration, which being overruled, and issue taken thereon, the jury found a verdict in favor of the plaintiff, upon which judgment was rendered.

From a bill of exceptions taken at the trial, it appears that the plaintiffs in error were joint owners and co-partners in a ferry at the junction of the Alabama and Cahawba rivers; that previous to the commencement of this suit, the plaintiffs in error were in the habit of stretching a rope across said rivers, to facilitate the passage of the boats; that the rivers at the time of the loss of the sulkey, were much swollen, particularly the Cahawba, which was much higher than the Alabama, and consequently running with great rapidity. That the force of the current compelled the hands on the flat to let go the rope across the Cahawba river, or be pulled into the stream; that the boat was washed down the Cahawba river, and in the attempt to pass under the rope, it caught the sulkey, and threw it into the river. There were three additional hands in the boat at the time of the accident.

The defendants counsel asked the Court to charge the jury,

1. That if they believed from the evidence, that the defendants had been guilty of no negligence in the management of the ferry at the time of the accident, and had done all in their power to prevent it, they were not responsible for the loss; which charge the Court refused to give.

2. That ferry-men in this State were not common carriers; which was also refused.

3. That no recovery could be had under the fourth count of the declaration; which the Court refused to give.

The Court charged that the law of common carriers was applicable to ferry-men, and that the owners of the ferry were not bound to attempt to cross the river, if it was in an impassable state, but had a right to wait, if such was the case, until the rivers fell, unless plaintiff consented to take the risk. To the refusals to charge, and to the charges given, the defendants counsel excepted, and now assign the same here for error—and also, the judgment of the Court on the demurrer to the pleas.

PECK AND CLARKE, for plaintiffs in error, contended that public ferry-men in this State, who have obtained a license and

given bond as the statute requires, cannot be charged as carriers at common law. That if the ferry was well attended, and the loss happened without any negligence or want of care and attention on the part of the ferry-men, they are not liable for the loss. They cited 1 Nott & McCord, 17.

THORNTON, contra, cited 4 Porter, 281; 2 Kent's Com. 419, 2 Nott & McCord, 19.

ORMOND, J.—Objections have been taken to the third and fourth counts of the declaration, but although not very formal, we think they are substantially correct. It is supposed that the third count does not show that the plaintiffs in error had any agency in the loss of the sulky, but that from the count it appears to have been the unauthorised act of their servants, for which they are not responsible, and the case has been assimilated to the doctrine established by this Court in *Cawthorne v. Deas*, 2 Porter, 276, where it was held, that "the master was not liable for injuries caused by the negligent conduct of his slave whilst not acting in his master's employment, or under his authority."

The language employed in this count is, "that the ferry-flat of the defendants was then and there under the care, government and direction of three servants of the said defendants, &c." We do not consider that it follows from the language used, that the agents of the defendants in the management of the boat, were slaves; but if that was the necessary inference, we think it sufficiently appears from the reference in this count to the previous counts (for the sake of brevity) by the use of the terms, "for the purposes aforesaid," that the servants of the defendants were in their employ, navigating the boat across the stream as a common ferry boat.

The fourth count charges the loss to have occurred from an obstruction thrown across the Alabama river, below the ferry on the Cahawba river, by the defendants. It is supposed that, as the defendants were the owners of the lower ferry, also, and as it was a usual and common, if not necessary means of crossing the river, to stretch a rope from one side to the other, to pull the boat over by, that therefore, the plaintiffs in error are not responsible for an injury arising from that cause.

We cannot agree that a license to keep a ferry on any of our

navigable streams, authorizes the grantee of the ferry to place any obstruction across the stream, even if such were convenient or proper to the passage of the ferry boat. The license merely amounts to a monopoly of the right of transporting passengers and property across the stream at that point, and this right must be exercised in subordination to other rights vested in the people at large; among which is the right to navigate the rivers of the State, declared by law navigable, of which the Alabama river is one. As, therefore, this obstruction placed across the Alabama river, was unlawful, it subjects those placing it there, to an action at the suit of any one injured by it, and the count was properly sustained.

The question upon the merits is, whether the keeper of a public ferry is liable, as a common carrier? On the part of the plaintiffs in error, it is insisted that he is not, because the whole matter is regulated by the statute, pointing out his rights and duties, and requiring him to enter into bond with surety, for their performance.

The act, Aik. Dig. 363, § 26, authorises the County Court to establish ferries and fix the rate of toll or ferriage, on persons or property carried across the same, and requires the Court to take a bond, with surety, from the person so applying, in the sum of one thousand dollars, conditioned "that he will keep a good and sufficient boat or boats, and keep the banks on each side of the water course in good repair, and that the ferry shall be well attended for travellers or other persons to carry or pass their horses, carriages or effects, over such water course."—The law also provides, § 29, that any one detained at any public ferry by reason of the ferryman not having good and sufficient boats, or other proper craft, and hands, or by neglecting to do his duty, may, by action before any justice of the peace, recover the sum of ten dollars; and that such recovery shall not be a bar to any action for damages sustained by reason of the insufficiency of the ferry.

A common carrier, is one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place; this is the definition adopted by Mr Justice Story, in his work on bailments, and is doubtless correct. This definition corresponds to the duties of a common ferryman, with one exception, which certainly cannot affect the question.

It is that those who employ him have no choice ; his right to transport the property of the traveller, is a monopoly granted by the State, and from that in part, results the right on the part of the State, to regulate his price, and to exact from him a bond, with surety, that he will provide, and always have in readiness, the means for transporting across the stream, the persons and effects of travellers. It by no means follows, that because the State has for the security of the traveller, and as the price of the monopoly granted, exacted from the ferryman a bond, with surety, and stipulated for the rates of ferriage, that the common law liability which attaches to the carriage of goods for hire, does not arise. The bond and surety is an additional security afforded by the State, because of the public nature of the ferrymen's employment. Nor does the fact that the State regulates the rate or toll, at all affect the question. In England, a great many statutes have been passed, regulating the prices of the carriage of goods by common carriers, which may be seen enumerated in 1 Bacon's Ab. 557 ; and it never has been supposed that the passage of these acts varied their liability as common carriers, which arises from the public nature of their employment.

An argument has been urged on the Court, that the reason of the rule of the common law in regard to common carriers, does not apply to common ferrymen, and that they should be held only answerable for injuries arising from neglect. The answer to this is, that such has always been the law. See *Rich v. Kneeland*, Cro. James, 330, and the cases ancient and modern, cited in the notes by Mr Justice Story, in his work on Bailments, 323. It does not become a Court, when the law is clear and settled beyond a doubt, to speculate upon consequences. Arguments of that description are more properly addressed to another forum. In conclusion, we are satisfied, that according to the ancient as well as modern authorities, ferrymen have always been considered as common carriers, and the circumstance, that in this State they are required to give bond, with surety, and that the price they receive is regulated by law, does not affect their liability at common law.

The last charge of the Court, that the defendants were not bound to cross the river if in an impassable state, we need not consider ; as the defendants did cross, the question did not arise,

and being purely abstract, could not by possibility, if decided wrong (which we do not intend to intimate) prejudice the defendants.

The judgment of the Court below is, therefore, affirmed.

HALE, ADM'R V. CUMMINGS & SPYKER.

1. An administrator may plead the insolvency of the estate committed to his charge, in abatement of a suit by *capias*, in the life-time of the intestate, in which an attachment also was sued out as an auxiliary process, and levied on real and personal estate. And the lien of such attachment is only an inchoate right dependent on the judgment, which not being allowed, the lien is gone.

Writ of error to the County Court of Montgomery county.

ASSUMPSIT against Carpenter, as drawer of a bill of exchange. The suit was commenced by *capias ad respondendum*, which was served; afterwards the plaintiffs sued out a writ of attachment pursuant to the statute authorising such process, and this was levied on certain real and personal estate. The personal estate was replevied by the intestate, who gave bond and security to deliver it to the sheriff, to satisfy such recovery as should be had in the cause.

Carpenter died before any judgment was had, and the defendant as his administrator, was made a party by *scire facias*, who pleaded in abatement, that the estate of his intestate was insolvent, and had been so represented by him, and so declared by the competent tribunal. The plaintiffs replied the issuance of the writ of *capias* and attachment, showing that a levy had been made on real and personal estate; the latter of which, was replevied according to law, and averring that this levy had never been returned discharged, or set aside.

The defendant demurred to this replication; whereupon, the County Court overruled the demurrer and gave final judgment

for the plaintiffs, to be levied on the property levied on by the attachment.

The defendant prosecutes his writ of error and here questions the correctness of the judgment sustaining the replication.

HARRIS, for the plaintiff in error—cited, Aik. Dig. 151, § 2, Ready v. Thompson, 4 S & P. 52. And insisted that the lien created by the levy was discharged by the death and subsequent insolvency of the estate, inasmuch as the statute provides for the equal division of the estate among all its creditors. The lien by itself creates no right whatever, and before it is perfected by judgment, the death of the intestate places all his creditors upon a perfect equality.

ELMORE, contra—cited, Meek's Supplement, 9, § 8, Collingsworth v. Horn, 4, S & P. 237; Cary v. Gregg, 3 Stewart, 433; McRae v. Augustine, 3 Porter, 138; Perine v. Babcock, 8 Por. 131; Pond v. Griffin, 1 Ala. Rep. N. S. 678.

GOLDTHWAITE, J.—The matter to be determined from this record is, whether an administrator can plead the insolvency of the estate committed to his charge, in abatement of a suit commenced by *capias* in the lifetime of the intestate, in which an attachment also was sued out as an auxilliary process, and levied on real and personal estate.

We state the question in this manner, to avoid complexity, for it is apparent that the only effect of the replication, is to place the fact of the levy upon the record.

The 33d section of the act of 1806, Aik. Dig. 151, § 2, provides, among other matters, as follows: And to the end that the executor or administrator, may have an opportunity to ascertain the situation of the estate of the testator or intestate, no suit or action shall be commenced or sustained against such executor or administrator, in such capacity, till after the expiration of six months from the time of proving the will of the testator, or of granting letters of administration on the estate of the deceased. Nor shall any suit or action be commenced, or sustained against him, after the estate of the testator or intestate is represented insolvent; *excepting however*, in all cases, actions for debts due for the deceased's last sickness and funeral expenses: *excepting also*, that if the executor or admin-

istrator, having objections to the claim on which any action (other than these last mentioned) may be brought, shall consent to have such claim settled by action at law,—in such case, the judgment shall determine the debt, and be reported by the commissioners as such.

It is proper to remark, that an antecedent part of the same statute provides for a *pro rata* distribution of the proceeds of an insolvent estate among all its creditors, but giving a preference to debts due for the last sickness, and for funeral expenses.

It is very clear, that this enactment does not contemplate any cases, in which suits can be maintained after an estate is represented insolvent, except those which are specified, and therefore, we conclude there is no difference between those suits prosecuted by attachment, and those commenced in the ordinary mode.

But the plaintiffs insist that they have acquired positive rights by the levy, which would have been recognised if the intestate was living, and therefore ought to be enforced notwithstanding his death.

To this, we answer, that it is much more probable that the attachment laws were intended to prevent the debtor from eluding his estate, than for the purpose of giving any creditor a preference; but whatever may be the object of such enactments, it is very certain the statutes now in force on this subject, do not repeal the act which has been quoted.

But independent of this, we think the assumption of the plaintiff, is based upon a mistaken conception of the effect of the lien of an attachment; it is inchoate and imperfect, until a judgment is rendered, for it is that alone which determines the claim on which the attachment rests to be just. If he fails to establish his claim, the inchoate lien is entirely gone, and there is no difference between such a case and this, because the statute has, in effect, declared that it is unjust for one creditor to absorb the whole estate when that is insolvent.

It is because the law declares that no suit shall be sustained after the estate is represented insolvent, that the lien is gone.

Let the judgment be reversed, and the cause remanded.

McRAE V. STOKES & SMITH.

1. The terms "in due form," as used in the act of Congress of May, 1790, which provides for the authentication of the records and judicial proceedings of the Courts of a sister States, merely mean that the attestation of the clerk shall be according to the form prescribed for the Court where the proceedings were had ; and the certificate of the presiding judge is made the only evidence that such form has been observed.
2. In the attestation of the clerk it was affirmed, that the records of another Court lately existing in the town in which his Court was holden, (and in which late Court the judgment was rendered,) had by law been there transferred ; the presiding judge certifying that the attestation was "in due form," it was held, that the transcript was sufficiently authenticated, without the production of the law by which the transfer was made.

THE defendants in error, brought an action of debt against the plaintiff, in the Circuit Court of Marengo, upon the exemption of a judgment recovered by them in the Superior Court of law, for the town of Petersburg, in the State of Virginia, on the 27th May, 1824.

On the trial, the defendant objected that the transcript of the record and judgment was not properly authenticated, and could not be received as evidence under the declaration; but his objection was overruled, and the transcript adjudged to be admissible as evidence. The attestation of the clerk and certificate of the Judge, are as follows:

"STATE OF VIRGINIA, Town of Petersburg, to wit:

I, Henry Bunly Gaines, clerk of the Circuit Superior Court of Law and Chancery, for the town aforesaid in the State of Virginia, (to which Court the records of the late Superior Court of Law, for said town, are now by law transferred) do hereby certify, that the foregoing is a true transcript of the record and proceedings, in a certain action of debt, lately depending in the said Superior Court of Law, for said town, between Stokes & Smith, plaintiffs, and John McRae and John Brent, defendants, with all things touching the same, as fully and wholly as they now exist among the records of my office. In testimony whereof, I have hereunto set my hand and annex-

ed the seal of said Court, this 26th day of March, one thousand eight hundred and thirty-six.

[Seal.]

H. B. GAINES, Cl'k.

"Virginia, Town of Petersburg, to wit:

I, John F. May, one of the Judges of the General Court, and sole Judge of the Circuit Superior Court of Law and Chancery for the town of Petersburg, in the State of Virginia, do hereby certify that H. B. Gaines, who hath given the preceding certificate, is clerk of the said Circuit Superior Court of Law and Chancery of the said town, and that his attestation is in due form.

Given under my hand, this 26th day of March, 1836.

J. F. MAY."

The defendant objected to the decision of the Court, adjudging the transcript to be duly authenticated, and a judgment being rendered against him, he has prosecuted a writ of error to this Court.

LYON, for plaintiff in error.

ERWIN, for the defendants.

COLLIER, C. J.—By the act of Congress of the 26th May, 1790, it is enacted, "that the records and judicial proceedings of the Courts of any State, shall be proved or admitted in any other Court within the United States, by attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding Magistrate, as the case may be, that the said attestation is in due form." Under this statute it is uniformly held, that the judgment of a Court of one of the States, is of the same dignity in every other, as that in which it is pronounced, and the act merely prescribes certain forms, which if complied with, entitle it to admission as evidence in the Courts of the sister States.

The terms "in due form" do not mean that the attestation of the clerk shall be according to the form used in the State where the record was offered in evidence, or to any other form generally observed; but according to the form prescribed for the Court, where the proceeding was had, and the certificate of the presiding Judge, is made the only evidence that such form

has been complied with; Drummond v. Magruder, 9 Cranch's Rep. 122 ; Smith v. Blagge, 1 Johns. Cases, 238 ; Barbour v. Watts, 2 A. K. Marsh. Rep. 292 ; Craig v. Brown, 1 Peters' C. C. Rep. 352; Henthorn v. Doe, 1 Blackf. Rep. 160.

It has been held, that the attestation of the clerk, need not expressly state, that the transcript is a copy of all the proceedings in the case. If he certifies, that the transcript is correctly copied from the record of the proceedings of the Court, and it appears to be complete, it is sufficient. Mudd v. Beauchamp, Litt. Sel. cases, 142. And in Ferguson v. Harwood, 7 Cranch Rep. 408, the clerk certified " that the foregoing is truly taken from the record of the proceedings" in this Court. The certificate of the Judge was regular, and the Court held that the presumption was, that the copy of the record was complete.

But it is argued for the plaintiff, that the attestation of the clerk, that the records of the late Superior Court of Law, &c. were transferred by law to his Court, is no evidence of that fact, but the law by which the transfer was made must be shown. The influence accorded to the certificate of the Judge, furnishes a sufficient refutation of this argument. But an objection, precisely similar was considered in Thomas v. Tanner, 6 Monroe's Rep. 52. In that case, it appeared that the records of a former territorial judge of probate were, on the admission of the territory into the Union, transferred to the clerk of the County Court. It appeared on the face of the transcript that a part of the proceedings was had before the Territorial Probate Court, and the other part, since the change of government, before the County Court. It was insisted, that the law authorizing the transfer of the records and their attestation by the clerk of the County Court should be proved; but the Court were of opinion, that the attestation of the clerk and certificate of the Judge, were entitled to full credit, and that every thing should be presumed right, according to the local law. This case, it will be observed, is directly in point, and confirmatory of the principles we have laid down.

Had the clerk in his attestation, omitted to state that the record had been transferred to his office *by law*, the inference would have been that it was legally there, and that he was the proper officer to attest it. We cannot conceive why the ex-

press affirmation of what would otherwise be implied, should make it necessary to establish the fact by proof.

We are of opinion, that the transcript was regularly authenticated, and the judgment of the Circuit Court is therefore affirmed.

BRIGGS v. HOBSON.

1. The notice published in a newspaper, that a debtor would appear at a place designated "on *Saturday* the 28th July next," and render a schedule of his property as an insolvent debtor, when in fact the 28th of July was Friday, held sufficient.
2. The condition of a bond to take the benefit of the act for the relief of insolvent debtors, is not forfeited because the justice of the peace will not permit the debtor to take the oath, or render the schedule required by law, if the creditors have been duly notified of the intended application.

Error to the Circuit Court of Greene.

THE defendant in error was the surety of one Bastian, in a bond, that he would appear at the time and place appointed, and render a schedule of his property. At the appointed time and place, Bastian appeared before the justices of the peace, and offered to make the oath, and render a schedule of his property to obtain the benefit of the act for the relief of insolvent debtors. But the justices refused to permit him to take the oath and render the schedule of his property, but declared the condition of his bond so to appear, forfeited, because the notice he had given pursuant to their directions, was in their opinion, insufficient. The notice which was given in a newspaper, was in all respects regular, except that one of the advertisements stated the time to be "*Saturday*, the 28th July next"—but in the others, the word *Saturday* was omitted. The 28th July was, in fact, Friday.

The bond being assigned to the plaintiff in error, (the credi-

tor) a *scire facias* issued thereon to the defendant in error, and judgment was thereon rendered against him. From that judgment, he appealed to the Circuit Court of Greene county, where the judgment was reversed, the Court being of opinion that the notice was sufficient, which opinion being excepted to, the plaintiff prosecutes this writ of error, and assigns for error the charge of the Court, as to the sufficiency of the notice.

STREET, for plaintiff in error.

ORMOND, J.—The question, whether the bond was forfeited, depends on the sufficiency of the notice. The supposed fault of the notice is, that in one of the insertions in the newspaper, the time of rendering the schedule is stated to be *Saturday*, the 28th of July, when in fact the 28th of July, the time appointed, was Friday. We are of opinion that the notice was sufficient. Saturday, the 28th of July of that year, was an impossible date, and could not therefore, mislead any one. The true date was given, and although it is added, that that day will be Saturday, no one could be thereby deceived, as the day of the month, and not the day of the week, was the time which regulated the proceeding.

The notice being sufficient, and the principal obligor offering to perform the condition of the bond, was in law a performance. It was not in the power of the debtor to compel the justices to act, to administer the oath and receive his schedule.—This is not like the case of one who covenants, that another shall do a particular act; in that case, he cannot say that he had no control over the action of such person, as an excuse for its non-performance, but is bound to procure the act to be done.

In this case, a benefit is by law conferred on the debtor, provided he does certain acts, the performance of which cannot be effectual without the concurrence of a justice of the peace.—Now, as it is not in his power to control the action of the magistrate, an offer to perform, must, in law, be a performance, at least, so far as to prevent a breach of the condition of his bond.

Let the judgment of the Court below, be affirmed.

CALLOWAY V. MCELROY & FLANNAGIN.

1. When the vendor of land fraudulently induces the vendee to purchase, by showing him lands of a superior quality, which are purchased, and afterwards lands of inferior quality are conveyed, the vendee can not make a defence at law, when sued for the purchase money. His relief is in equity, which can render complete justice to each party, by rescinding the contract, or allowing compensation.
2. An unsuccessful attempt to defend at law, when no defence could there be made, under the circumstances of the case, will not preclude a party from relief, in a court of equity.
3. It is no cause to dismiss a bill for relief, that the complainant admits that the only witnesses by which he can prove his case, are interested, so as to be incompetent at the time when the bill is exhibited, because their interest may be removed before the hearing.
4. An offer to compromise, which is not accepted, will not preclude relief in equity, although payment may subsequently be made by an agreement between the parties, by giving notes due from other persons. The question of accord and satisfaction is matter of defence, and it will not be inferred from the payment in this mode.

Writ of error to the Court of Chancery, for the third district of the southern division.

THE bill alleges, that the complainant Calloway, in February, 1837, purchased from the defendants several tracts of land, which are specifically described; for which he executed his notes, with two other individuals as securities. Previous to the purchase, the several tracts were shewn by the defendants to the complainant and his two securities, without respect to the numbers indicated by the public survey, and the contract of purchase was made with reference to the lands thus shewn and examined. The defendants executed conveyances for lands which the complainant accepted, knowing nothing of the numbers by which they were designated, but supposing they were the same tracts which he had examined and contracted to purchase. Two of the tracts conveyed, were not the tracts which were shewn and purchased, and two of those which were shewn, and formed a part of the contract, were not conveyed. The lands conveyed, are worth not more than one dollar and twenty-five cents, whilst those shown and not conveyed, are

worth fifty dollars per acre; thus making a difference in the respective values, of from four to six thousand dollars.

The complainant, as soon as he ascertained the fraud which had been practised on him, demanded a rescission of the contract, which the defendant refused. They soon after, commenced suits on the notes given for the purchase money, and the complainant having no other witnesses to prove the fraudulent transaction than his two securities, and being advised that he could defend at law, filed interrogatories for the defendant, McElroy, to answer, as the suits were instituted in his name. These were answered, but the fraud was denied. The complainant then proposed to his counsel, to deposit the amount of his indebtedness in the hands of the clerk or sheriff, in order to render his securities competent witnesses to prove his defence of fraud in the suit at law, but was advised that this would not avail him, and that he should endeavor to compromise; this also was attempted, but did not succeed, and the complainant then permitted judgments to be taken against him. Some portion of the judgments have been paid by giving other notes in discharge of his liabilities. The complainant admits that he is only able to establish his case by his securities, whom he has indemnified against their liability, in a manner satisfactory to them. The bill prays an injunction against the judgment at law, and for general relief.

The Chancellor dismissed the bill for want of equity, under the impression that all the matters of defence stated in the bill, were available as a defence at law.

The complainant now prosecutes his writ of error and questions, by his assignment of errors, the correctness of this decree.

G. W. GAYLE, for the plaintiff in error.

EDWARDS, contra.

GOLDTHWAITE, J.—The case made by this bill, is one of exclusive equity jurisdiction, because complete justice cannot be accorded in a Court of law, to each of the contending parties. This results from the fact that the complainant, by virtue of the conveyance received from the defendants, is invested with the title to lands which he never purchased; there-

fore, the effect of a successful defence by the complainant, to a suit at law, on the notes made by him, would be, that the defendants would have neither lands nor money, and to obtain a re-conveyance of the former, would themselves be driven to a Court of Equity. Besides, in most cases of this nature, there are material equities arising out of the use and occupation of the land, and also, with respect to improvements made upon it, which a Court of law is altogether incompetent to adjust.

Although the precise question now presented, has never been determined in this Court, its attention has recently been called to the examination of the powers of a Court of Equity, to afford relief in cases of fraudulent sales. In one, the fraud consisted in a false representation of title, *Young v. Harris*, 2 Ala. Rep. 108; and in the other, on shewing lands which were not conveyed, but which formed the inducement to purchase. *Camp v. Camp*, 2 Ala. Rep. 632. In neither of these did we doubt the competency of a Court of Equity to afford relief.

We will not undertake to determine that there may not be cases of fraudulent sales, in which a Court of law may properly afford relief in a defence to a suit for the purchase money, even in a case where possession is retained by the purchaser; but we think it cannot be done in such a case as this, when the consequence to the vendor would be, the loss of his land, and also, the consideration for which he parted with the title.

2. As the defence in this case would have been entirely ineffectual, if it had been made out in the Court of law, the complainant cannot be prejudiced by the attempt there made, under the statute, to obtain the necessary discovery from the defendant, *McElroy*, by the exhibition of interrogatories.

3. Neither do the allegations, with respect to the difficulty of obtaining evidence of the fraud said to have been practised, because of the incompetency of his witnesses, countervail the equity of the bill. It may be, that other evidence can be procured, or if the interest of the witnesses cannot be otherwise removed, it certainly can by payment of the notes signed by them, without impairing the complainant's right to relief.

4. Nor is the statement, that an attempt was made to effect a compromise, and when that failed, that a portion of the debt for the purchase money, was extinguished by the transfer of other notes, a sufficient reason to decline jurisdiction, because

it cannot be inferred from this, that either a compromise was effected, or a new contract made. If such was indeed the case, the new contract, or the accord and satisfaction, will be proper matter to be insisted on by the defendants answers.

Our conclusion is, that the bill ought not to have been dismissed, and the decree of the Chancellor is accordingly reversed, and the cause remanded.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT
MONTGOMERY V. PERDUE.

1. A surety in a promissory note, which the principal had also secured by a mortgage on real estate, gave notice to the mortgagee to proceed forthwith on the mortgage, or require another surety in his stead : at the time the notice was given, the mortgaged premises were of value sufficient to pay the debt, but when sold eighteen months afterwards, they had depreciated in value, and fell short of paying it *fifty per cent.* or more—*Held*, that the surety could not, by notice, require the creditor to proceed upon the mortgage, that being a security collateral to his contract to pay; and that the creditor had his election to proceed on the note or mortgage, but might have been required to sue on the note.

THIS was a proceeding by notice and motion, at the suit of the plaintiff in error, against the defendant, in the County Court of Montgomery, to recover of him, as the surety of E. N. & S. Peirce, the amount of a promissory note for the sum of "twenty one hundred and fifty-one dollars and seventeen cents, with interest from date, under the second section of the act of June, 1837." The note is dated the 23d September, 1837; and payable on "or before the first of June, 1840."

The defendant pleaded:

1. The general issue.
2. That the defendant is a surety, and as such, gave notice to the plaintiff to foreclose a mortgage which had been executed to it, by his principals; but the plaintiff failed to proceed on its mortgage, which, at the time of the notice, was an ample security, but has since, by the depreciation of the mortgaged,

premises, proved insufficient for the payment of the debt. The plaintiff joined issue on both these pleas, and the case was tried by a jury, who returned a verdict for the defendant.

On the trial, a bill of exceptions was sealed; at the instance of the plaintiff. From the bill, among other things, it appears that the defendant offered in evidence a mortgage for two tracts of land, amounting in the aggregate, to four hundred acres, executed for the purpose of securing three several promissory notes, the first payable on the first of June, 1838, the second, on the first of June, 1839, and the third is that now in controversy. The mortgage provides, that "if any or either of said notes are not punctually paid, it shall be lawful for the President of said Branch Bank, to seize and sell said property at public auction, at such time and place as he may think proper, giving ten days notice of the same, by advertisement in some newspaper published in said State, applying the proceeds of said sale to the payment of said notes, or either of them, whether the same are due or not, with all interest, damage and costs, as well of the sale, as upon the notes." It was proved, that the first note had been paid, and a judgment obtained on the second, which was still unsatisfied. To the introduction of the mortgage as evidence, the plaintiff objected, but the objection was overruled, and the mortgage read to the jury; whereupon, the plaintiff excepted.

The defendant then read as evidence, a paper, of which the following is a copy, viz :

"Alabama, Lowndes County, Oct. the 12th 1838.

"To the Cashier of the Branch of the Bank at Montgomery. Please to take notice of the notes protested for non-payment the fourth of June last, wherein E. N. & S. Peirce were principals, myself and others security, that you are notified by myself to proceed forthwith against the property mortgaged for the payment of the Bank debt, or you will not consider myself bound for any of the notes where I am security on any of their paper, or require of the above named E. N. & S. Peirce, a security in place of my name.

I am, your most obedient servant,

RILEY F. PERDUE."

Which notice it was admitted had been duly received by the Cashier of the Bank.

The defendant then proved, that the lands mortgaged, in the fall of 1838, would have sold for enough to satisfy the debt due the plaintiff, but that it was not sold under the mortgage until June, 1840, when it was then sold on a credit of one, two and three years, for thirteen hundred and fifty dollars.

The Court charged the jury, that the notice given by the defendant, to foreclose the mortgage, was sufficient to make it the duty of the plaintiff to comply with the request of the defendant, without delay; and that if in consequence of the delay of the plaintiff, the property mortgaged to it by E. N. & S. Peirce, had depreciated in value between the date of the notice, or a reasonable time thereafter, and the day when it was sold by the plaintiff, the defendant was discharged from his liability, to the extent of the depreciation, as surety in the note. To this charge, the plaintiff excepted.

Other charges were given and excepted to, but as they are not considered by this Court, it is deemed unnecessary to state them.

A judgment being rendered in favor of the defendant, the plaintiff has prosecuted a writ of error to this Court.

ELMORE, submitted an argument in writing, and HARRIS, for the plaintiff, argued the case at the bar. It was admitted to have been decided by this Court, and in New York, that a surety in a note might give a verbal notice to the creditor, to sue the principal, and that if the note could have been collected by a suit promptly brought, the surety may resist a recovery against himself, if an action was not brought in a reasonable time after notice, by showing that the principal has become insolvent. And under a statute of this State, where a *written* notice is given, to sue, and no action is brought against the principal, or surety, in a reasonable time, the surety is discharged without proof of the principal's insolvency. But the case before the Court, does not come within the common law principle which has been stated, nor within the influence of the statute. The mortgage is no part of the defendant's contract, nor could he, by a mere notice to foreclose, control the plaintiff's action upon it. Had he desired the benefit of it, he should have applied to a Court of Equity, (if to any tribunal,) to compel its foreclosure, or have paid the debt, and then availed

himself of it, as means of reimbursing his advance. 1 Ala. Rep. N. S. 23; 4 Johns. Chan. Rep. 132; 6 Wend. Rep. 610, 1 Story's Eq. 322, 592; 9 Porter's Rep. 792; King v. Baldwin, 17 Johns. Rep. 384.

HAYNE, for the defendant—insisted, that the principle admitted by the plaintiff's counsel to have been recognized by this Court, and in New York, would not be unwarrantably extended by applying it to the case at bar. There is no distinction between the duty to collect by suit, and the duty to collect by sale, under the mortgage. In *Paine v. Packard*, 13 Johns. Rep. 174, the Court said, where the creditor did an act injurious to the surety, or omitted to do an act when required, which equity, and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases, the surety would be discharged. He also cited 7 Johns. Rep. 332; 13 *ibid.* 383; 17 *ibid.* 384; 6 Wend. Rep. 610; 10 *ibid.* 162; 13 *ibid.* 375; 1 Stewart's Rep. 11; 3 *ibid.* 9, 160; 8 Porter's Rep. 284.

COLLIER, C. J.—It has been so often decided, as to be considered the settled law of this Court, that a surety may quicken the diligence of the creditor, by requiring him to put in suit the security by which the debt is evidenced, and if upon such requisition, suit is not brought, and it appears that it might have been made available, the subsequent insolvency of the principal, is a good defence for the surety, even at law. *Bruce v. Edwards*, 1 Stew. Rep. 11; *Herbert & Kyle v. Hobbs & Fennell*, 3 Stew. Rep. 9; *Goodman v. Griffin*, *ibid.* 160; *Gayle v. Randall*, 4 Porter's Rep. 236; *Scott v. Bradford*, 5 Porter's Rep. 443; *Strader v. Houghton*, 9 Porter's Rep. 334. But this principle we think cannot be applied without disturbing others equally well settled, so as to authorise the surety to require the principal, by a mere notice, to proceed on any collateral security he may have for the payment of the debt. By a collateral security, we mean one in which the surety is not bound, or one which is apart from the principal or primary engagement.

Where the principal and surety make a direct promise in writing to pay money, and in addition, one or both of them execute a mortgage to the creditor, to secure a performance of

their undertaking, the creditor is not obliged to proceed upon his mortgage, but may either foreclose it, or prosecute an action at law upon the promise of the debtor and his surety. The mortgage is a mere security for the debt, and is regarded as an incident to the legal contract to pay. In *Cullum v. Emanuel & Gaines, et al.* 1 Ala. Rep. N. S. 23, the law is so laid down; and the Court there held, that a surety could not injoin a judgment at law, by showing that his principal had mortgaged to the creditor, property of greater value than the amount of the debt.

It has been held, that sureties are entitled to go into a Court of Equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt; and it has been said that a surety upon the maturity of the debt, may obtain the aid of equity to compel the creditor to sue for, and collect the debt from the principal, if he will indemnify the creditor against the risk, delay and expence of the suit. 1 Story's Eq. 322 and cases cited. But this latter proposition has been questioned by some, who have maintained, that the right of the surety does not, independent of a statute, extend so far as to authorise him to compel the creditor to seek a recovery of the principal; that his contract obliges him to pay the debt, and when he has done this, he may reimburse himself by suit.

When the surety has paid the debt of the principal, he stands in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without his knowledge, having a right to have those securities transferred to him, though there was no stipulation for it; and to avail himself of those securities against the debtor. Where the creditor has not applied such securities in discharge of the debt, he must hold them as a trustee, ready to be applied for the benefit of the surety; and if he disables himself from yielding up to the surety, the means of reimbursement, which he had, the surety will be exonerated from liability, *pro tanto*; unless the creditor acted without a knowledge of the rights of others, and with good faith and just intentions. *Cullum v. Emanuel & Gaines, et al.* 1 Ala. Rep. N. S. 23.

We have thus briefly stated the rights of the surety against the creditor, and we think they lend no countenance to the de-

fence set up by the plaintiff in error. It was entirely competent to have required the Bank to have proceeded against the principal debtors ; but had such a requisition have been made, no consequences favorable to the surety would have resulted, as the note which was due at the time the notice was given, has, (as we learn from the record) been paid by the principals. As for the mortgage, it was but another and indirect means of securing the payment of the notes, which we have seen, the Bank might avail itself of in the first instance, or if it so elected, it might sue upon the direct engagement to pay. The nature and extent of the sureties, contract, does not authorize him to act for the creditor, which of the two remedies he shall pursue, and consequently, a notice to proceed upon the mortgage must be unavailing as the ground-work of a legal defence.

The principle which recognizes the right of the surety to require the note or bond of the principal to be put in suit, must proceed upon the idea that the creditor impliedly undertakes to do so, upon a notice to that effect being given him. In the *Manchester Iron Man. Co. v. Sweeting*, 10 Wend. Rep. 162, the Court say, where the plaintiff refuses to prosecute the principal, on the request of the surety, his neglect is a virtual agreement to discharge the former, and look alone to the responsibility of the latter. But this reasoning cannot be applied to a notice to foreclose a mortgage, for that constitutes no part of the contract to pay the debt, but is merely assistant to it.

Again: the creditor cannot be injured by suing the principal to judgment even if he be insolvent, but it may be important to him in a country where real property fluctuates in value as in this, that he should choose his own time of selling under a mortgage. To this, it may perhaps be answered, that he may, if it is depressed, become its purchaser and take the chances of the market; but it might not suit him to purchase, and he should not be forced to become a purchaser against his interest.

In every view in which this case has presented itself, we are of opinion that the defence interposed in the County Court should not have been sustained; and the judgment is consequently reversed, and the cause remanded.

THE STATE OF ALABAMA v. MONK.

1. When the office of sheriff is full, and a temporary inability of the sheriff to act, from sickness, the Court has no power to direct the coroner to impanel a jury in a criminal case.
2. Whether, in the event of the refusal, or permanent inability of the sheriff to act, the Court does not, inherently, possess the power of appointing a ministerial officer to execute its mandates—*Quere.*
3. The act authorizing the coroner, temporarily to fill the office of sheriff, when a vacancy occurs, until the Executive appoints, is not in conflict with the constitutional provision giving the appointment in case of vacancy, to the Governor.
4. The act authorizing the coroner to act, when the sheriff is a party in interest to any suit, and perform all the duties of sheriff, whenever, from any cause, he may be incompetent to act as such, Aik. Dig. 96, is in affirmance of the common law, and merely authorizes the coroner to act, when the sheriff is *temporarily* incompetent to act, from relationship, interest, &c. &c. but does not apply when the sheriff is *unable* to act.

Reference of novel and difficult questions from the Circuit Court of Mobile.

THE defendant was tried, and found guilty of murder. At the trial of the cause, the prisoner moved the Court to set aside and quash the pannel of jurors summoned to try the cause, because it appeared that the jury had been summoned, and a list of the jury had been served on the prisoner by the coroner, and not by the sheriff; but it appearing to the satisfaction of the Court, that on Monday, when the Court was about to open, the sheriff of Baldwin county, was confined by sickness, and unable to attend the Court and execute its orders. It was ordered that the coroner of Baldwin, who was then present, do attend said Court, during its present term, and discharge the duties of sheriff thereof, which was ordered to be recorded on the minutes of the Court. The Court refused to quash the pannel, but considering the question one of novelty and difficulty, reserved it for the consideration of this Court.

THE ATTORNEY GENERAL, for the State—cited, the act of 1833, Aik. Dig. 96 § 2, empowering the coroner to act, when from any cause, the sheriff was incompetent to act.

J. GAYLE, contra—cited, the act of 1826, Aik. Dig. 389, §

10, imposing on the coroner the duties of sheriff, whenever that office became vacant, and insisted that the act was in conflict with the constitutional provision which devolves on the Governor, the appointment of sheriff, whenever the office was vacant, that the legislative provision was and void.

He also maintained, that the act cited by the Attorney General, had no application to this case, because, here there was no vacancy, but a mere temporary inability to act.

ORMOND, J.—The act cited by the Attorney General from Aikin's Digest, 389, that whenever the office of sheriff became vacant, the duties of the office should devolve on the coroner, does not, in our opinion, conflict with the constitutional provision, giving the appointment of sheriff, in case of vacancy, to the Governor. The right of the Executive, to fill the office when a vacancy occurs, is entirely consistent with the temporary performance of the duties of the office by the coroner, until the Executive can act. It is impossible to suppose, that the framers of the constitution intended, that during the interval which must elapse between the times when the office became vacant, and the appointment of the new sheriffs the Court should be without an officer to execute its mandates. All that was intended was, that in such a case, there should not be a re-election, but that the Executive should fill the vacancy. But here there was no vacancy, but a temporary inability on the part of the sheriff, to perform the duties of his office; there was therefore, no authority conferred by this statute on the coroner to act.

The Attorney General also insists, that the act authorizing the coroner to execute all process when the sheriff is a party in interest to any suit in the Circuit or County Courts, and perform all the duties of sheriff, whenever, from any cause he may be incompetent to act as such, Aik. Dig. 96, authorized the action of the coroner in this case. We are very clear in the opinion, that this act confers no authority under the state of facts disclosed by this record; at common law, the coroner could not execute a writ, when the sheriff was dead, or the office vacant, and therefore a necessity existed for the passage of the act of 1826, previously cited, which authorises the coroner to act during the *interregnum*, caused by the vacancy of the

office of sheriff. The act we are now considering, is merely in affirmance of the common law, which authorised the coroner to perform the duties of sheriff, when that officer was temporarily incompetent, from relationship, interest in the question, &c. 5 Com. Dig. 217, G. 3.

There is a broad distinction between incompetency and inability, when these words are placed in juxtaposition, though they may be occasionally used to express shades of the same meaning; but in such cases, the context will always explain the sense in which the term is employed. Thus, in this case, the context shows very conclusively that *temporary* incompetency of the sheriff, was what was provided against—the cases put in the statute by way of example, cannot be considered cases of *inability* on the part of the sheriff to act.

By an act passed in 1826, the Legislature provided, that where jurors had not been drawn or summoned as required by law, or did not attend, that the Court, “may direct the sheriff or other attending officer, *in case of his absence or inability to serve* to empanel a jury instantan,” &c. Aik. Dig. 298, § 24. In the case at bar, as the record is silent on the subject, we must presume that a jury regularly summoned were in attendance; but in such a case, no authority is given to invest the coroner with the power of the sheriff, but in case of the absence or inability of the sheriff to act, his duties are devolved on an *attending officer*. This no doubt refers to the deputies of the sheriff, or constables in attendance, three of whom the sheriff is required to summon as bailiffs, to attend upon the Court. It cannot, we think, apply to the coroner, who is not as such, required to attend upon the Court, and cannot therefore be embraced by the term “attending officer.”

It appears then by this brief review that the Legislature has provided for the case of a temporary vacancy in the office of sheriff, and for his temporary incompetency to act, and declared who shall perform its duties—it has also provided for summoning a jury, (when that duty has been omitted) by an attending officer of the Court, in the absence or inability of the sheriff to serve; but the case at bar is neither of these. Here the office was full, and there was a mere temporary inability on the part of the sheriff to exercise the duties of the office in person, but no reason is shown why those duties could not be performed by

deputy. It is, to be sure, stated that no deputy was in attendance; this if made known to the sheriff, he would doubtless have supplied, by authorizing some one to act in his place.

The facts of this case, have forced on us the consideration of a question of the highest possible import to the well being; and indeed, to the very existence of society. The concession, that the sheriff is such an integral part of the Court, that its functions would be suspended in the event of his refusal, or inability to act, would seem to strike at the very foundations of social order, by placing it in the power of one man, at his pleasure, to impede or obstruct the action of the tribunals appointed to adjust controversies between individuals, and to punish crimes against the State. We are, however, relieved from the necessity of considering whether, every Court, invested with the great powers just spoken of, does not possess the inherent power to appoint a ministerial officer to enforce its mandates; because in this case, there was such an officer in existence, able and we must presume, willing to obey the commands of the Court. His sickness satisfactorily accounts for his absence from the Court, and we must presume that if informed of the fact, that he had no deputy in attendance, that he would have promptly deputed some one to act in his stead. Until such refusal it cannot be pretended that the extraordinary power of the Court, which we have hinted at, if it exists, could be exerted; and by a review of the statutes, we have shown that no power is conferred by legislative enactment in such a case as the present. As therefore, the jury was not legally summoned, the prisoner was not legally convicted, and the judgment founded on a verdict so obtained, must be set aside, and a *venire de novo*, awarded.

The judgment of the Court below, is therefore reversed, and the cause remanded, that the prisoner may be again tried, unless in the interim discharged, by due course of law.

THE STATE V. SCHUESSLER.

1. In a criminal case, where the charge requested may have been entirely immaterial, and its propriety is not shown by the evidence disclosed, it will be presumed to have been properly refused. In such cases error must be affirmatively shown, and it will not be presumed.

THE prisoner was indicted at the fall term, 1841, of the Circuit Court of Montgomery county, for the murder of one James Glover, and convicted of manslaughter.

At the trial, certain evidence was introduced, conducing to prove that the prisoner assaulted and stabbed the deceased, by which he came to his death. Evidence was also introduced in behalf of the prisoner, conducing to prove that he fought in his own defence. On this evidence, the counsel for the prisoner moved the Court to charge the jury, that if the deceased first assaulted the prisoner, that he was not bound to retreat, but might repel force with force; and if the prisoner in his defence, was in danger of receiving great bodily harm, although he might save himself by flight, yet he was not bound to fly, but may kill the assailant in his own defence, to prevent this bodily harm.

This charge the Court refused to give, but reserved the question of law arising on it, for the decision of the Supreme Court; the counsel for the prisoner considering it as novel and difficult.

WILLIAMS, for the prisoner, insisted that the charge requested, was improperly refused, because it is inconsistent with the true spirit of liberty, that one citizen should, under any circumstances, be required to retreat from another when assaulted; the more especially when the assault is so violent as to endanger life, or when there is danger of great bodily harm.

THE ATTORNEY GENERAL, contra, insisted that no such question was here reserved. No evidence is stated from which the prisoner was authorised to call for such witnesses, and it is proper to infer that the Court, for this reason, refused.

GOLDTHWAITE, J.—We can find nothing in this case to warrant us in coming to the conclusion that an error was committed when the charge demanded was refused.

The defect of the case is, that it does not disclose the facts in evidence before the jury, and we cannot infer the charge to be erroneous, when it may have been refused because there was no evidence to warrant it.

If it is admitted that the prisoner when assailed, might repel force by force, and that he was not required to retreat or fly before his adversary, this admission does not render him excusable, if he either causelessly or wantonly deprived his adversary of life. The evidence, even when most favorably construed for the prisoner, only shows that he was assaulted by the deceased, but does not show that his life was endangered, or great bodily harm menaced. Neither does it show that the slaying was not wantonly or causelessly done.

A state of facts may have been shown, to which the charge would have been appropriate; or the evidence may have been such as to render the inquiry entirely immaterial, and even absurd.

We cannot presume the fact, and adhering to our well-established rule, that error must be affirmatively shown, we feel constrained to affirm the judgment.

GIBSON, *et al.* v. CARSON'S ADM'R.

1. Although the complainant may make out, by proof, a case which entitles him to relief, yet he cannot recover upon a bill, the allegations of which are not adapted to the case proved.
2. *Semble*, the declarations of a father made simultaneously with the execution of a deed of gift to a daughter, that the deed was his will; it would save him the trouble of making a will; he was to enjoy the property during his life, &c. —when coupled with the fact, that he was an habitual drunkard, of but ordinary understanding; and that the deed divested him of the present right of possession of all his estate, both real and personal, satisfactorily show, that he was ignorant of the legal effect of what he did, and that he supposed he was executing a testamentary paper. And a deed executed under such circumstances, may be set aside, on the ground of surprise.
3. *Semble*, the wife acquires no right, *by marriage*, to the property of the husband, and can not maintain a bill in Equity, to set aside a deed of gift executed by him previous to the marriage, on the ground that he continued in possession, and she married him under the impression that the property was his.

This cause comes here by writ of error from the Chancery Court sitting at Cahawba.

THE defendant's intestate filed his bill, stating that he had but one child by his first marriage, who several years previous to the 8th of May, 1824, intermarried with Thomas Gibson; that his wife and son-in-law, often persuaded and importuned him to convey his property to his daughter, and he as often refused, until on that day, being at a drinking house in the neighborhood of his residence, and under the influence of spirituous liquors, by the persuasion of his son-in-law, he consented to execute voluntary conveyances of all his property, to his daughter, and her then and future increase. Gibson accordingly, while the intestate was in this state of mind, prepared two deeds, which were then executed by intestate; the one conveying his land, and the other his slaves and other personal property, to his daughter, and her then and future issue; which deeds were taken possession of by Gibson.

It is alleged, that the intestate had but little property, yet the deeds did not reserve to him the property conveyed for the maintenance of himself and wife during life; he was consequently dissatisfied with what he had done, and went to Gib-

son's in a few days, and not finding him at home, he informed Mrs. Gibson of his dissatisfaction, and asked her for the deeds, who replied, if he was unwilling for her to have the property, he could have the deeds; and accordingly, handed them to him. The intestate carried the deeds home with him, intending to burn them, and informing his wife of his intention, threw them into the fire; his wife made an effort to rescue them, and succeeded in rescuing one of them, which intestate, until within a few months before filing his bill, supposed to be so obliterated as to be illegible and unintelligible. It is further charged, that intestate's wife immediately carried the deed to Gibson, and related to him the circumstances under which she prevented it from being burnt.

It is then stated, that intestate's first wife died on the 13th of August, 1828, leaving no other issue than Mrs. Gibson; and on the 11th of November, 1829, he married a second wife, by whom he has five children. At the time of the intestate's second marriage, he was in possession of the lands and slaves conveyed by the deeds of May, 1824, (except the slaves he had given to his daughter and son-in-law) and his wife believed him to be the owner thereof, and looked to them as a source for her maintenance. Intestate alledges, that he gave to his daughter, upon her marriage, and since, negroes and other property, of the value of twenty-five hundred dollars; among the negroes so given, were four negroes, embraced by the deed of May, 1824. On the 17th April, 1832, Gibson caused the deed for the slaves and other personal property, to be proved by one of the subscribing witnesses, and recorded in the clerk's office of the County Court of Dallas, telling the witness not to make the registration publicly known.

It is further stated, that after the second marriage of the intestate, and the birth of two children, and while he was still in possession of the land and slaves, except those given to Gibson and wife as aforesaid, the intestate was very sick, and called on Gibson to write his will, asking him if the deeds were still in existence, who affirmed, most solemnly, they were destroyed; Gibson wrote the will, devising the land and bequeathing the slaves, except those given to him and wife, to the second wife of the intestate, and her issue. That will, it is alleged, has been destroyed by intestate, and cannot now be exhibited.

Mrs Gibson died previous to the drawing of the will, leaving five children under twenty-one years of age.

When the intestate heard that Gibson had had the deed recorded, he spoke to him on the subject, but he refused to give him any satisfactory explanation.

It is further alleged, that on the night of the third of November, 1837, all the negroes left the intestate's house, and went into the possession of Thomas Gibson, his son Robert C. Gibson, and son-in-law, James Campbell, who refused to deliver them up on demand, asserting a right to hold them under the deed.

Intestate alleges, that he is about sixty-seven years of age, infirm and unable to labor, and has but little property left, except the land, of which he apprehends an effort will be made to divest him at some future time.

Thomas Gibson, Robert C. Gibson, James Campbell and wife, and the infant children of Thomas Gibson, are made defendants; and the bill concludes with a prayer, "that the titles to said land, slaves and other personal property, may be decreed to have been all along, and still to be in your orator, and that the said deeds may be set aside and cancelled, as having been obtained without consideration, and fraudulently, from your orator, and as being in fraud of the rights of his wife and children, and that said slaves be restored to your orator; and that the said Thomas Gibson, Robert C. Gibson and James Campbell, be decreed to pay what is reasonable and right, for the use of said slaves, from the time of their seduction and elopement, until surrendered up." There is also a prayer for general relief.

A copy of the deed for the slaves and other personal property, is exhibited with the bill, from which it appears that the gift is to Mrs Gibson and her children born at the date of the deed, or thereafter to be born, without any reservation in favor of the intestate or any other person.

Without attempting to recite the answers of the defendants, it may be enough to say, that the answer of Thomas Gibson is a denial of the equity of the bill, and a statement of facts going to exculpate himself from all impropriety of conduct.

The defendants, Campbell and wife, and Robert C. Gibson, say, they believe that the deeds in question, were executed without any trick, fraud, &c., admit the detention of the slaves

by Thomas Gibson, and conclude their answers with a general demurrer.

The infant defendants answer in usual form, by their guardian, *ad litem*.

Depositions were taken as well by the complainant as the defendants, but as the testimony is not contradictory, it will be quite sufficient to recite it substantially, so far as it need be noticed. It is shown that the deeds were made and executed by the intestate, at the time and place alleged; that the intestate at that time, was about fifty years of age, and though an habitual drunkard, was not then intoxicated, but was apparently, as intelligent as usual. No effort on the part of Gibson, was observed, to induce the execution of the deeds, but he wrote them by the intestate's directions, who said, they were such as he desired; that his wife had requested him to make them; that they were not made to defraud, as he was not in debt, and they would save him the trouble of making a will, &c.

Further: The intestate said, the deeds were his will, and as he had ordained it to be done, that he was to enjoy all the property during life, which latter remark was assented to by Gibson. The witnesses do not recollect that the slaves were bequeathed by the will which Gibson wrote for intestate some years before his death, but the land was thus disposed of. Although the intestate was not drunk when he executed the deeds, he made his mark instead of writing his name, assigning as a reason therefor, that his hand was too unsteady to write; and when the deed for the slaves was recorded, eight years thereafter, Gibson requested the subscribing witness, not to make it public.

Upon the hearing, the Chancellor was of opinion, that the execution of the deeds was induced by the fraud, imposition, or undue influence of Gibson, or else the intestate misapprehended the legal effect of the deeds, and interest they conveyed to the objects of his bounty. Thereupon, he adjudged that the deeds be set aside and wholly vacated, the slaves be delivered up to the complainant; and that the master take an account, and report the value of the hire of the slaves, &c. since they went into Gibson's possession; also, the names and description of the increase of the slaves, if any, &c. To review the decree of

the Chancellor, the defendants have prosecuted a writ of error to this Court.

EDWARDS and G. W. GAYLE, for plaintiffs in error, cited 2 Kent's Com. 451; 1 Chitty's Prac. 827; 3 McC. Rep. 477; 1 Hill's Rep. 316; 1 Story's Eq. 235; 3 Eccl. Rep. 461, 254; 4 Dess. Rep. 518; 2 H. & Johns. Rep. 422.

BOLLING, for defendant, cited Kennedy's heirs and ex'rs v. Kennedy's heirs, 2 Ala. Rep. 593; 1 Dess. Rep. 250, 300; 3 ib. 273; 3 Madd. Rep. 191; 2 H. & Johns. Rep. 292; 6 ibid. 435; 1 Munf. Rep. 527; 3 Cow. Rep. 572; 2 Ves. sr. Rep. —; 3 Ves. & B. Rep. 119; 5 Ves. Jr. Rep. 27, 67; 6 ibid. 267; 9 ibid. 292; 10 ibid. 209; 13 ibid. 136, 14 ibid. 273; 1 Madd. Ch. 224; 1 Cox's Rep. 333; 1 Johns. Ch. Rep. 482.

COLLIER, C. J.—The grounds upon which the bill in this case, seeks to set aside the deeds are, 1. Because they were executed in consequence of the importunities of the intestate's first wife, and his son-in-law, Gibson. 2. Because Gibson, by his persuasion, at a time when the complainant was drunk at a drinking house, in his neighborhood, induced him to execute the deeds in question, by which he divested himself of all the property, of which he had previously been the proprietor. These are to be regarded as the *gravamen* of the bill, and the allegations of the subsequent acts and declarations of the intestate, Gibson and others, are to be considered as merely ancillary, or explanatory of the transaction.

The proof in the cause does not show that the deeds were executed by the intestate, in consequence of the intreaties used, or influence attempted to be exercised by his wife, son-in-law, or any one else. And instead of being drunk at the time of the execution of the deeds, it appears, that the intestate was apparently as intelligent and self possessed, as usual. There is then, an entire failure to make out by proof the case stated by the complainant, and the *onus probandi* being thrown upon him by the answers, it is clear that the decree of the Court of Chancery cannot be sustained. In attaining this conclusion, we are not to be understood as determining, that the proof is insufficient to authorise relief, but merely that there is such a want of harmony between the *allegata* and *probata*, as to ren-

der the evidence under the pleading, wholly ineffectual. Clements, adm'r v. Kellogg, by her next friend, 1 Ala. Rep. N. S. 330.

We might here close this opinion, but my brothers think it best to look into the evidence, and inquire whether, if the bill were adapted to it, the result would be different from that we have expressed. That equity has jurisdiction to set aside, cancel, or reform deeds or other instruments, is abundantly shown by the case of Kennedy's heirs and ex'rs v. Kennedy's heirs, 2 Ala. Rep. 593, *et post*; and this has been done in some cases in which there was no pretence of actual or positive fraud. Thus in Slocum and wife v. Marshall, *et al.* 2 Wash. C. C. Rep. 397, it appeared, that a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefitted by the same, and that the property conveyed by the deed would become her's after the decease of her parent; and where the operation of the conveyance was to deprive the daughter of the estate; the Court decreed a conveyance of the property, and an account of the proceeds of the part which had been sold, so as to effect the justice of the case, and to give to the daughter the property to which she would have been entitled, had not the conveyance been made. This decision was not made on the ground that the transfer of the property by the daughter, was a fraud on the marital rights of the husband, or that fraud or imposition was meditated by the father; but the Court was of opinion that as the father's will had proved ineffectual for securing to the daughter the consideration which induced her to make the deed, a Court of Equity could do nothing less, than to set aside the deed, as having been made under a mistake, and for a consideration which had failed.

Jones v. Robertson, 2 Munf. Rep. 187, bears a more striking analogy to the case before us, than any we have seen. In that case it appears, Mrs. Robertson sent for Jones to prepare a writing for her to execute, changing the disposition of her property, which she had previously made by will; he accordingly prepared a deed of gift, with which she expressed herself satisfied, and executed it. It appeared from the previous and subsequent declarations of Mrs. Robertson, that she intended to dispose of her estate by will, and was surprised when informed, that the instrument executed would have a different effect.

The Court set aside the deed upon the ground of surprise, on the part of Mrs. Robertson. In the Earl of Bath and Montague's case, 3 Ch. Cas. 56, *et post*, which was most elaborately examined, the Court held, that *no other surprise*, except that which is accompanied with fraud and circumvention, will be a good ground to set aside a deed in equity. See, also, Jeremy's Eq. Jurisd. 366. But Mr Justice Story supposes that there is nothing technical or peculiar in the word *surprise*, as used in Courts of Equity. "When a Court of Equity relieves on the ground of surprise, it does so upon the ground that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions. The case of Evans v. Llewellyn, 2 Bro. Cha. Rep. 150, is a direct authority to this very view of the matter. There may be cases where the word *surprise*, is used in a more lax sense, and where it is deemed presumptive evidence of fraud. 1. Foub. Eq. 125. But it will always be found that the true use of it is, where something has been done which was unexpected, and operated to mislead or confuse the parties on the sudden, and on that account, has been deemed a fraud. Irnham v. Child, 1 Bro. Ch. Rep. 92; Marquis of Townshend v. Stangroone, 6 Ves. Rep. 327, *et post*; Twining v. Morrice, 2 Bro. Ch. Rep. 326; Willan v. Willan, 16 Ves. Rep. 81, *et post*." 1 Story's Eq. 133, note.

My brothers are of opinion that the evidence in the cause shows, that the intestate was surprised in the execution of the deeds. His declaration that they were his will; they would save him the trouble of making a will; he was to enjoy the property during his life, &c. when coupled with the facts, that he was an habitual drunkard, of but ordinary understanding; and that the deeds divested him of the present right of possession of all his estate, both real and personal, are considered by them as satisfactory to show that he was ignorant of the legal effect of what he had done, and that he really supposed the deeds were merely testamentary papers. While I will not dissent from this view, I decline the expression of an opinion upon the point, inasmuch as it is unnecessary to decide it. But conceding that this conclusion of fact is correct, and I am prepared to say that it furnishes a sufficient reason in equity, why the deeds should be set aside; and if upon their face, they ap-

peared to be testamentary dispositions of property, the filing of the bill would operate a revocation.

The fact that the intestate had the possession of the slaves and other property in question, does not render the deeds void, as a fraud upon the marital rights of the wife of his second marriage—even if she was ignorant of their existence. The wife acquires no right *by marriage* to the property of the husband. True, he may make a settlement upon her, but until this is done, he cannot be controlled by her in making such disposition of his estate as he thinks proper. With no propriety then, can the wife be regarded as the purchaser, by the simple act of *marriage*, of her husband's estate.

We do not deem it necessary to consider whether, or how far, the subsequent acts of the intestate, or Thomas Gibson, may be looked to, as explaining the transaction. What we have said, will most probably lead to an adjustment of the rights of all concerned; and have only to add that the decree is reversed, and the bill dismissed without prejudice, at the cost of the defendant in error, to be levied of the estate of his intestate, &c.

RICE & MOORE V. RICHARDSON & KEITH, ADMR'S.

1. Fraud, in a sale made by an administrator of his intestate's effects, is a valid defence to the contract, when attempted to be enforced by an administrator *de bonis non* of the estate.

Error to the Circuit Court of Greene.

THIS action was brought by the defendants in error, as administrators *de bonis non* of the estate of William Brantly, against the plaintiffs in error, on a note made by them to William Tasker, administrator of the estate of William Brantly; upon issue taken on the plea of *non assumpsit*, the plaintiffs below, obtained a verdict and judgment.

Upon the trial, the plaintiffs in error, offered to prove that the note sued on was executed by the plaintiffs in error on the purchase of a negro, at the sale of the property of William Brantly, by Tasker, the payee of the note, as his administrator; and that at the sale Tasker committed a fraud on the plaintiffs in error, by artfully concealing the condition of the health of the slave. so that the plaintiffs in error were thereby deceived; and that the negro at the time of the sale, was of no value whatever. To the introduction of this testimony, the defendants in error objected, and the Court sustained the objection, on the ground, that it was not competent for the purchaser of property of an administrator to resist the payment of the purchase money, on the ground of fraud, and that his only mode of redress would be to sue the administrator personally for the deceit; to which opinion of the Court, the defendants excepted, and now assign the same for error.

PECK & CLARK, for plaintiffs in error.

ORMOND, J.—The question to be determined in this case is, whether the maker of a note given on the purchase of a slave at a sale made by an administrator, can set up as a defence a fraud in the sale, when sued on the note by a succeeding administrator, who sues as administrator, *de bonis non*.

If the administrator who made the sale, and to whom the note was given was the plaintiff, no doubt could be entertained that the defence could be made. Fraud vacates all contracts, whether made by the person to be interested thereby, or by an agent. Where the agent is not only the fraudulent actor, but is the holder of the legal title, and attempting to enforce it, it could not be tolerated that he should resist the defence on the ground that the benefits of the fraud were to go to others; and that redress must be sought in another action against him. Paley on Agency, 325.

How then is the case varied, because the suit is not brought by the fraudulent actor, but by those who have, by operation of law, acquired the right to bring the suit.

The note taken by a former administrator, is merely assets of the estate, and cannot stand on higher ground than a note taken by the intestate in his lifetime in his own name, and yet

where an administrator sues in such a case, no one can doubt that any defence, which could have been made against the note in the hands of the payee, could be made, when it is attempted to be enforced by his representative after his death. So, if it had been assigned, the defence could have been made against the assignee, innocent of the fraud.

It is probable, the opinion of the Court, proceeded on grounds of public policy, and that it was necessary to uphold such sales, by making the actor alone responsible. But we cannot conceive that public policy should require a fraudulent sale to be affirmed. The general, we might say, the universal rule of law is, that fraud vacates all acts; even the solemn judgment of a Court, is a nullity if obtained by fraud. To turn the defendants round to seek redress from the original actor in the fraud, might, in its results, be to them a denial of justice. We are, for these reasons, of opinion that the Court below, erred in refusing to permit the defendants below to prove the sale fraudulent; and its judgment is therefore reversed, and the cause remanded.

LYON V. LEAVITT, *et al.*

1. A surety for the payment of the purchase money of land, may be entitled to subrogation of the vendor's mortgage, in case of payment, but when this is conceded, it will not warrant him in resisting payment, on the ground that he can not have relief under the mortgage, unless the vendor relieves a prior incumbrance created by himself. A surety is bound in the same manner and to the same extent as his principal, and if the latter is satisfied with the purchase, it can not be rescinded by the surety for a defect in the security afforded by the title executed.

Writ of error to the Chancery Court of the First District of the Southern Division.

THE bill alleges that one E. O. Jones, who was dead when the bill was filed, purchased certain lots of land, situate in the city of Mobile, from Joseph Bates, Jr. and William Hale, for

which he gave his notes, indorsed by the complainant, Lyon, dated the 11th January, 1836, and payable on the 11th January, 1839, each for the sum of five hundred and seven dollars and fifty cents, with interest, at the rate of eight per cent. payable annually, and one other note without indorsement, for the sum of one thousand four hundred and thirty-five dollars, with the same rate of interest, payable annually, the principal of which is due the 11th January, 1844. At the time of giving these notes, Jones executed a mortgage to Hale & Bates for the lots so purchased, to secure the payment.

The bill then proceeds to allege, that the consideration for which the notes indorsed by Lyon, were given, has entirely failed, because the lots sold by Bates & Hale, were held by them under a purchase from Joshua Kennedy, made on the 5th day of August, 1834, and they on the same day, executed a mortgage to Kennedy of the same lots with others, to secure the purchase money agreed to be paid by them, amounting to upwards of twelve thousand dollars, of which either the whole or greater part is yet unpaid. That the lots sold to Jones, are subject to the incumbrance so created by Bates & Hale to Kennedy, and that no beneficial title has vested in Jones, nor can Bates & Hale, by reason of their said mortgage remaining uncanceled by their negligence, make a perfect and indefeasible legal title, according to the terms of their warranty to Jones. It also alleges, that when the complainant indorsed the said notes to Bates & Hale, he did so in the confident expectation that they would remove the incumbrance so created by them, as by law they were bound, in which event, the mortgage executed to them by Jones, would have availed the complainant as a security to protect him against the liability arising from his indorsement, and that without such reasonable expectation, he would not have indorsed the notes.

The bill also charges one George G. Henry, being then in negotiation for one of the notes so indorsed, and previous to the time when it fell due, inquired of the complainant, if there was any defence against it, and whether it would be paid at maturity. Whereupon, complainant informed him of the transaction, on which the note was given, the failure of its consideration, and that it would not be paid until the incumbrance thus created by Bates & Hale, was removed: notwithstanding this,

the said Henry purchased the note, and afterwards passed it to J. W. & R. Leavitt, in payment of a debt due from him to them, which debt had been previously contracted. The other note indorsed by the complainant, is charged to be in the possession of Hale. The bill further alleges, that the note thus held by J. W. & R. Leavitt, has been put in suit in the County Court of Mobile county.

The bill prays that Bates, Hale, Henry and J. W. & R. Leavitt, may be made parties defendants, that the suit at law may be enjoined until Bates & Hale shall remove the incumbrance so created by them, and if that is not done within a reasonable time, that the injunction may be made perpetual.

An injunction was allowed by a Circuit Judge, but the Chancellor afterwards dismissed the bill for want of equity.

To reverse this decree, the complainant now prosecutes this writ of error.

HUNTINGTON, for the plaintiff in error, made the following points:

1. Notes given for the purchase of land, carry with them a lien upon the particular land for which they are given, and this lien continues against a purchaser from the vendee with notice. *Montague on Lien*, 89; *Grant v. Mills*, 2 Vesey & Beame, 306.

2. An accommodation indorser of notes given for the purchase of lands, is a surety, and is entitled in equity to be subrogated to all the rights of the vendor. *Bailey on Bills*, 459, and *Note*; *Cullum v. Emanuel & Gaines*, 1 Ala. Rep. N. S. 26; *Copis v. Middleton*, 11 Eng. Cond. Ch. Rep. 168.

3. That when one surety signs under a stipulation that other persons shall be also bound as co-sureties, the obligation is voidable if this stipulation is not complied with; the same principle is conceived to extend to any other stipulation, which if not complied with, will lessen the security or increase the liability of those who thus stipulate. *Bibb v. Reed*, June Term, 1841; *Cullum v. Gaines & Emanuel*, 1 Al. Rep. N. S. 26.

4. That when a motion is made to dismiss a bill for want of equity, its allegations must receive a liberal construction, and should not be criticised. Thus in this case, the allegation that the notes were indorsed with the confident expectation that

the incumbrance should be removed, must be considered to charge a stipulation to that effect.

5. That if Bates & Hale have induced the complainant to believe they would remove the incumbrance created by them, and have failed to do it, this neglect impairs the right of the complainant to subrogation, and therefore discharges him.

6. That the defendants, Henry and J. W. & R. Leavitt, are chargeable with notice of the complainant's equities, and therefore stand in the same condition as Bates & Hale. *Coddington v. Bay*, 20 Johns. 637; *Wardell v. Howell*, 9 Wend. 173.

CAMPBELL, contra—cited, *Palmer v. Bumpass*, 1 J. C. R. 213; *Abbot v. Allen*, 2 ib. 519; *Anderson v. Lincoln*, 5 Howard, 279; *Green v. Finacune*, ib. 542; *Wilson v. Jordan*, 3 S. & P. 92; *Christian v. Scott*, 1 Stew. 490; *Garrow v. Hallet*, 2 Stewart 449.

GOLDTHWAITE, J.—There would be a number of highly important questions to be discussed in this case, if the bill stated a case of fraud. But this is not the ground on which the complainant seeks relief. He insists that inasmuch as the mortgage held by the defendants, Hale & Bates, would enure to his benefit, if he is compelled to pay the notes indorsed by him, he is authorised to demand that they shall be required to remove the incumbrance created by them.

If this could be allowed, the effect would be to introduce a principal into equity jurisprudence which seems to be entirely novel.

It may be conceded for the purposes of this argument, that the complainant is a surety, and furthermore, that as such, he would be entitled to subrogation of the mortgage upon discharging all the debts of Jones, but even this concession does not authorise him to demand additional security to that with which his principal seems to have been satisfied.

The result of introducing such a principle would be to destroy the security which the vendors stipulated for, when they sold the land, and would place the indorser in a condition much more favorable than that occupied by the maker of the note; but the indorser must be content with the security contracted for by the maker, and in a case like this, the vendee can only

resist the payment of the purchase money, when he is evicted by title paramount.

The decree dismissing the bill is affirmed.

KENNEDY'S HEIRS AND EX'RS V. KENNEDY'S HEIRS.

1. An appeal will not, in general, lie from an interlocutory order in Chancery; yet if such an order will finally affect the merits of the case, or deprive the party complaining of it, of any benefit he may have at the final hearing, an appeal is allowable.
2. Where a decree is rendered, disposing of the entire merits of the controversy, and a reference is made to the master to report upon certain matters as the basis of the definitive action of the Court, it is competent for the Chancellor to direct a special report to be made upon some particular part of the case, and to confirm it, before the master has closed his examination upon the matters referred.
3. The Court of Chancery decreed that an absolute deed of land be set aside, and that the defendants re-convey one undivided moiety to the complainant, and that it be referred to the master to report a conveyance, and take an account of advances of money, rents and profits, &c.—*Held*, that the defendant had a lien on the land, in virtue of the legal estate with which he was invested, for any balance that might be found due him on taking an account, and that the Court of Chancery should not direct a conveyance to be reported and executed before the master had taken an account, unless such conveyance reserved this lien.

THE appellees in April, 1839, filed their bill in the Chancery Court sitting at Mobile, praying that a deed bearing date the 13th December, 1824, by which Wm. E. Kennedy, their ancestor conveyed to Joshua Kennedy, the ancestor and testator of the appellants, extensive and valuable real estate, in and contiguous to the city of Mobile, might be set aside. At the term of that Court, holden in the fall of the year 1840, it was adjudged by the decree of the Chancellor, that the deed of December, 1824, was made for the purpose of enabling Joshua Kennedy to secure and provide for the management of the estate, and to secure an adequate provision for the children of Wm. E. Kennedy. It was also adjudged, that Joshua and Wm. were jointly interested in the lands embraced by the

Price and McVoy claims, and that the Baudine was covered by the Price claim. These being the several tracts of land, an undivided moiety of which, was conveyed by the deed in question.

It was further adjudged, that the appellees were entitled to an account for all monies received by Joshua Kennedy in his lifetime, and by his executors since his decease, upon all sales of lands embraced by either of the claims designated, &c.

The Chancellor also ordered and decreed, that the complainants be admitted into the possession of an undivided half of the Price, McVoy and Baudine claims, save and except such parts thereof as were sold and conveyed, either by the said Wm. E. or Joshua Kennedy, or the executors of the latter, since his decease; and that it be referred to the master to prepare a deed, conveying to the complainants those lands, with the exception aforesaid, which deed shall be executed by the executors of Joshua Kennedy, under the power contained in the will of their testator, and in obedience to the directions of the decree.

It was also referred to the master to state the accounts between the complainants and the defendants, Hallett and Walker, executors, &c. as representing Joshua Kennedy in his several capacities of guardian of the children of Wm. E. Kennedy, and executor of the will of Wm. E., and also trustee, under the deed of the 13th December, 1824; and also to state an account between the complainants and the defendants, Hallett and Walker, executors, &c. on account of lands sold, or conveyed by them since the death of their testator. And it was further ordered, that in taking the several accounts required, the executors of Joshua Kennedy be allowed all fair credits to which, individually, or in their representative capacity, they may show themselves entitled, &c.

The decree of the Chancellor was affirmed on writ of error, by this Court, at the June term of 1841. After the judgment of affirmance, the appellees filed their petition in the Court of Chancery, stating that the conveyance directed by the decree, has no connection with the adjustment of the matters of account between the parties; that they are entitled to the possession of, and the evidence of title to an undivided moiety of the lands in question; therefore, they pray a special and separate report, touching the deed to be executed by Hallett and Wal-

ker, executors as aforesaid. They also state, that on the 20th Sept. 1841, they caused a notice to be served on Hallett and Walker, requiring them to produce the accounts, &c. kept by their testator as trustee, of the lands sold, &c.—also, the map, showing the land now subject to the decree, the account of sales, &c. of lands made, &c. by them, and receipts on account thereof. But to this notice, Messrs Hallett and Walker made no response whatever.

The appellees further state, that they are compelled to rely upon the record of deeds in the County Court, which is, as they believe, imperfect and unsatisfactory; and therefore, they pray that each of the appellants may be compelled to exhibit such books, accounts, &c. as the notice recited requires, showing the land that has been sold, or leased, the monies collected, &c. That Hallett and Walker may be examined touching monies they may have received from sales, &c. of the land specified in the decree; and lastly, that the memoranda of accounts kept by Joshua Kennedy as guardian of Wm. E.'s children, and administrator of his estate, may be produced.

The solicitors of the appellants, were duly notified that the petition was filed, and that motions, as indicated by the prayer, would be submitted to the Court to be holden in November, 1841. It was thereupon referred to the master to inquire, ascertain, and report, what lands passed by the deed of the 13th Dec. 1824, made by William E. Kennedy to Joshua Kennedy, and that he report a plat thereof, describing and identifying the same by metes and bounds, to the end, that the deed to be decreed by the Court be specific, if any deed be decreed. Also, that he report what portion of said lands have been conveyed since the date of said deed of 1824, by the said William, by said Joshua, and by said Hallett and Walker, executors.

The master reported that the prayer of the petition was reasonable, and should be granted; that the execution of the deed had no connexion with the investigation of the accounts between the appellants and appellees, and is so treated by the decree. This report of the master was confirmed, the books, accounts, maps, &c. ordered to be produced before him; and the appellants required to submit to an examination touching the several matters stated in the petition; *and further*, he was authorised to make a separate report of the conveyance, to be

executed in pursuance of the decree in the cause. Thereupon, the master reported the draft of a deed, conveying an undivided moiety of the lands in question, which professed to be made in conformity to the decree of 1840. To this report, the appellants excepted, and assigned the following grounds. 1. The lands embraced by the conveyance are not specifically described, so that their locality is open to future litigation, &c. 2. The conveyance is not in conformity with the decree in the cause. 3. The lands excepted from the operation of the decree, are not particularized. 4. The report was made before the testimony was fully taken and closed on the general reference.— 5. The conveyance reported, is broader in its terms than the decree authorises.

The exceptions being overruled by the master, the cause then came on before the Chancellor, on a motion to confirm the master's special report; whereupon it was adjudged, that the exceptions be overruled, the report confirmed, and the draft of a conveyance reported by the master, be received and accepted, and that Hallett and Walker, executors, &c. be required to execute the same; and thereupon the defendants below appealed to this Court.

STEWART, for the appellants.

HOPKINS AND CAMPBELL, for the appellees.

COLLIER, C. J.—In considering this cause, a preliminary question suggested itself, viz: Is the case brought here by appeal, such as this Court can entertain? It is correct as a general proposition, that an appeal will not lie from an interlocutory order; but it is not universally true, for if such an order will finally affect the merits of the case, or deprive the party complaining of it, of any benefit he may have at the final hearing, an appeal is allowable. *Buloid v. Miller*, 4 Paige's Rep. 473; *Rogers v. Paterson*, *ibid.* 450; *Lomax v. Picot*, 2 Rand. Rep. 247; *Beach v. Fulton Bank*, 2 Wend. Rep. 225; *Ringgold's case*, 1 Bland's Rep. 5; *McKim v. Thompson*, *ibid.* 270. The order confirming the separate report of the master, is in one sense interlocutory, in not putting an end to the suit; yet, if it is obnoxious to the objections made to it, it might prejudice the appellants, if upon taking the account, a balance should be found

in their favor. In this view, the jurisdiction of this Court is entirely defensible. *Robertson v. Bingley*, 1 McC. Ch. Rep. 333; *Allen v. Belcher*, 2 H. & M. Rep. 595; *Gibson v. Randolph*, 2 Munf. Rep. 310; *Danels v. Taggart's adm'r*, 4 G. & Johns. Rep. 311.

It is objected to the proceedings of the Court of Chancery, 1. That the separate report of the master was premature and irregular. 2. That the draft of the conveyance reported is variant from the decree under which the reference was made, and does not particularize the land to be conveyed.

1. According to the practice in the English Chancery, where the inquiries are numerous, and it is of importance that a part of the decree should be satisfied before the whole of the proceedings are sufficiently matured to enable the master to make a general report, he will report separately on any particular inquiry. This practice is thus regulated by the general orders of 1828. "Previous to that time, the master was not," says Smith, "at liberty, unless authorised by the decree to make a separate report." 2 Smith's Chan. 157. It is insisted that, under the old practice in England, which is our guide here, in the absence of any statute, or rule of our own, that a separate report must be authorised by the general decree in the cause, and not by a mere decretal order. This argument, in our opinion, is not sustained, either by reason or authority. If by a decree, disposing of the entire merits of the controversy, a reference is made to the master to ascertain and report upon certain matters as the basis of the definitive action of the Court, it is competent for the Court to make further orders to advance the inquiry of the master. The principles settled, will not by such a course be disturbed, but the justice of the cause will be advanced. The only change made in this respect by the orders of 1828, is to enable the master to make a separate report, without a special order of the Court. 1. Hoffman's Ch. Prac. 543. It was then a matter addressing itself to the discretion of the chancellor, to grant or refuse the motion for a special reference and a separate report. His opinion of its propriety was to be formed from all the circumstances shown to him, and is not revisable by an appellate tribunal; unless, perhaps, it appear that it may be productive of injury. In this view, the proceedings of the Court of Chancery were not premature, and

are not irregular, unless the second objection taken is well founded.

2. It was supposed by the appellant's counsel, that the conveyance approved by the Chancellor does not conform to the decree in the cause, that the decree excepts from the operation of the deed, such part of the lands as were sold or conveyed by Wm. E. or Joshua Kennedy, &c. while the conveyance excepted such as had been sold *and* conveyed, and might consequently operate more extensively than the decree intended. We are not prepared to say from the transcript before us, that this ground is well taken in point of fact; if it is, the conveyance is certainly objectionable. But be this as it may, it is obvious from the decree, that an exception is made in favor of the appellants for all the lands which may have been disposed of, by Wm. E. or Joshua Kennedy, or Hallett and Walker, as the executors of the latter, by any operative contract; and even if the words *sold* and *conveyed*, are used conjunctively in the decree, the exception in the conveyance, if these words are thus employed there, so as to exert a controlling influence, is not sufficiently broad. The conveyance explicitly reserves to the grantors all estate and claim which they or either of them may have in the lands described in it; also, the estate and claim of the other appellants; "except the estate, interest and claim, that the said Joshua Kennedy, in his lifetime, had and held by the Spanish grants to Thomas Price, Wm. McVoy and Alexander Baudine, the deed to him from Wm. E. Kennedy, of the 13th day of December, A. D. 1824, and the acts of the Government of the United States, recognizing and confirming the said claims, and granting further assurances of them." This exception from the reservation in favor of the executors and heirs of Joshua Kennedy is entirely proper, and taken in connection with the reservation of lands sold by Wm. E. or Joshua Kennedy, or by the executors of the latter, shows the extent to which the conveyance, if executed, would operate.

Conceding that the conveyance is such as the appellees' counsel contends, and still, it is objectionable. The appellants by the deed of 1824, to Joshua Kennedy, have a legal title to the lands in question, and are entitled to a lien upon them for the payment of any balance, that may be found due on taking the account directed by the decree. If the conveyance ap-

proved by the Chancellor should be executed by Hallett and Walker, they would lose this security for the reimbursement of the estate of their testator. It is no answer to say that the balance may and probably will be in favor of the appellees, for neither the Court of Chancery, or this Court can, in anticipation of the master's report, say how this matter may be.

It is no objection to the conveyance, that it does not particularize the lands to which the appellees are entitled. Perhaps neither the stating part, or the prayer of the bill, authorize partition to be made, but be this as it may, the decree neither contemplates or authorises it. If partition shall hereafter be desired, it will be entirely competent for the parties to take the proper steps for that purpose, which are very simple and clearly defined.

From what has been said, it results, that this Court has jurisdiction of this cause, by appeal, and the Chancellor may, in his discretion, authorise a separate report of a deed, and require it to be executed by Joshua Kennedy's executors, but that the conveyance reported and approved, is defective, because it does not continue the appellant's lien for what may be found due on final account. The decretal order appealed from, is consequently reversed, and the cause remanded; that the Court of Chancery may direct such deed to be executed, as we have indicated would be proper.

PETTIGREW v. BISHOP.

1. Where one engages to serve another as an overseer for twelve months, and leaves his employer during the year, without his consent, or any sufficient reason, he can not recover compensation for the services actually rendered.

Error to the County Court of Pickens.

ASSUMPSIT in the Court below by the defendant in error,

against the plaintiff in error, to recover for work and labor done as an overseer.

On the trial it was proved, that the plaintiff below, contracted with the defendant as an overseer for twelve months, for the sum of two hundred and seventy-five dollars and twenty bushels of corn; that he commenced about the 1st January, 1839, and continued near eleven months, and that he quit his employer's service without his consent. The defendant moved the Court to charge the jury, that if they believed from the evidence that the plaintiff contracted to serve the defendant as an overseer, for twelve months, it was an entire contract; and if before that period elapsed, he left the employ of defendant without his consent, or other good cause, the law was with the defendant. This charge the Court refused to give, and instructed the jury, that if they believed the plaintiff had labored faithfully for the defendant for nearly eleven months, he was entitled to a verdict for the value of his services during that time, to which the defendant excepted. The jury found a verdict for the plaintiff; upon which the Court rendered judgment, from which this writ of error is prosecuted.

The assignment of error is the refusal to charge, and the charge given by the Court.

PECK and CLARKE, for plaintiff in error.

B. F. PORTER, contra.

ORMOND, J.—The contract of the defendant in error, in this case, was to serve the plaintiff in error as an overseer, for a fixed compensation, and to recover, it is necessary he should shew either that he has performed the contract on his part, or that he has been prevented from doing so by the act of the opposite party. The attempt here is to recover compensation for a part of the time, without shewing any reason for his failure to perform the entire contract; to permit this to be done, would be to permit one of the parties to a contract, to make a material alteration in its terms, without the consent of the other. In *Wright v. Turner*, 1 Stewart, 29, this point was thus ruled in a case precisely like this. The cases of *Green v. Linton*, 7th Porter, 133; and of *Pharr v. Beck*, at the last term, depend on the same principle. See, also, the case of *Cutter v. Powell*,

6 Term Rep. 320, where the point was thus ruled on great consideration.

At the last term, in the case of *Brumby v. Smith*, we held that a workman who had contracted to do a job of work, to be paid on its completion, could not recover a *pro rata* compensation, the work having been destroyed by fire without his fault, before it was finished.

For the error in the charge of the Court, the judgment must be reversed, and the cause remanded.

MOORE V. HATFIELD & SMITH.

1. Under the act of 1839, which allows the oath of the plaintiff to be received in suits upon accounts not exceeding one hundred dollars, the deposition of the plaintiff may be taken, under circumstances that will authorise the taking the deposition of any other witness.

Writ of error to the Circuit Court of Marengo county.

ACTION of *assumpsit* on the common counts. The pleas of the defendants do not appear in the transcript; but the case was submitted to a jury as on issue joined, and a verdict was returned for the plaintiff, on which judgment was rendered.

A bill of exceptions was taken by the defendant, during the progress of the trial, from which it appears that the deposition of one of the plaintiffs was taken by interrogatories to prove the demand, which was an account less than one hundred dollars. The deposition was excepted to, on the ground that it was the deposition of one of the plaintiffs. This was overruled, and the defendant excepted. Some other exceptions were likewise taken, but were not urged.

PECK, for the plaintiff in error.

HUNTINGTON, contra.

GOLDTHWAITE, J.—This case involves the construc-

tion of one of the sections of an act, to regulate judicial proceedings, passed in January, 1839. It is in these terms: "In all suits to be commenced upon accounts, for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by the oath of the defendant; but this section shall not apply to the case of executors and administrators, trustees and guardians when sued."

This is a remedial statute, and although in derogation of the common law, is not for that reason, to be construed in such a manner as to limit or restrain its beneficial effects.

We cannot presume the intention to be, that those who are in health and able to attend the Courts of the country in person, are alone to be permitted to avail themselves of its provisions; nor is it reasonable to suppose our Legislature so churlish as to make a rule entirely for the benefit of residents, when the amendment of the law, could with equal propriety be extended to those residing elsewhere. We think the reasonable construction of the statute, is to make the plaintiff a *witness* to prove the account, and that his deposition may be taken, under circumstances which will authorise the deposition of any other witness. We yield, the more readily to this view, because no difficulties can arise from adopting such a practice, as in cases where the deposition is taken, the defendant will necessarily have notice of the manner by which it is contemplated to prove the account; a notice which he would otherwise not receive, as the statute evidently contemplates that the plaintiff may be sworn, whether the defendant is or is not present.

Let the judgment be affirmed.

MOORE & PAINE v. TARLTON AND PAINE.

1. A party indebted to others, in the sum of sixteen hundred dollars, or thereabouts, executed an absolute conveyance of real estate, in which the consideration expressed was eight thousand five hundred dollars; afterwards, the property was sold under execution and purchased by the judgment creditor. The grantees in the deed, filed their bill against the grantor and the purchaser, stating that although unconditional in its terms, it was intended as a mere security for what was due, and praying that they might have the benefit of it as such. It was admitted that the deed would not authorise a recovery at law, but would be there considered as fraudulent. *Held*, that being void for fraud in fact, it was void *in toto*, and could not be enforced to any extent in Equity.

THE plaintiffs in error, filed their bill in the Court of Chancery, sitting at Mobile, in which they state, that on the 8th of April, 1837, together with James Paine, their deceased partner, they drew a bill on Wm. S. Paine & Co. for the sum of twelve hundred and seventeen dollars and sixty cents, payable thirty days after date, in favor of J. & R. Geddes; that the bill was accepted by the drawees and passed to the Messrs. Geddes in payment of a debt due them by the acceptors. That the defendant was on the day aforesaid indebted to the plaintiffs and their deceased partner in the sum of two hundred and four dollars and sixty-one cents, for goods sold and delivered, and to the plaintiff, Moore, in the sum of one hundred and sixty-seven dollars.

The bill then alleges, that the plaintiffs have been compelled to pay the bill drawn by them, to J. & R. Geddes, although it was accepted by William S. Paine & Co. and drawn for their exclusive benefit, and the money thus paid, together with the several sums owing as aforesaid, are now due and unpaid. And further, on the first day of May, 1837, the defendant, Paine, one of the firm of Wm. S. Paine & Co. with the view of indemnifying the plaintiff against all loss or damage on account of the bill of exchange, and to secure the payment of the several other sums due as aforesaid, did execute and deliver to the plaintiff, Moore, a deed of conveyance for a certain lot of land lying, being and situate in the city of Mobile, (a particular description of which is set out.) This deed accompanies the bill

as an exhibit, from which it appears that the deed is made professedly upon a consideration of eight thousand five hundred dollars, paid to the grantor by the grantee; it is absolute and unconditional in its terms, and appears to have been duly proved and recorded.

It is further stated, that the only consideration on which the deed is founded is the indebtedness of William S. Paine & Co. and of William S. Paine individually, to the plaintiffs as aforesaid, and that the plaintiff, Moore, accepted it as a security for the repayment of these several sums, without paying any thing further therefor.

The plaintiffs also state, that in May, 1838, John Tarlton and S. V. V. Schuyler, respectively, recovered judgments in the Circuit Court of Mobile, against Wm. S. Paine & Co. each of which judgments is for the sum of twenty-seven hundred and twenty-nine dollars and forty-four cents; on each of these judgments executions were issued and placed in the hands of the sheriff of Mobile county, in August, 1838, who levied the same on the lot conveyed to the plaintiff Moore, as aforesaid, and in virtue thereof, sold and conveyed it to the defendant, Tarlton, for the sum of twenty-five dollars; that Tarlton is in possession of the lot, and refuses to pay to the plaintiffs the amount of their several demands, or to sell it and pay them from the proceeds, although often requested so to do.

The bill prays process of subpœna to the defendants; that Tarlton may pay the plaintiffs their demands, or that the lot may be sold and they paid from the proceeds; and for general relief. Subpœna's issued, and were executed on the defendants; Tarlton answered, and the bill was taken as confessed as to Paine, for the failure to answer.

The cause was heard on depositions and documentary evidence adduced by the parties. The Chancellor dismissed the bill at the costs of the plaintiffs; and to revise that decree, the plaintiffs have prosecuted a writ of error to this Court.

LESESNE, for the plaintiffs—contended, that there was no evidence of fraud on the part of Moore, in accepting the deed, and even if the motives of Wm. S. Paine, were not the most correct, the security cannot be defeated.

As to the inadequacy of the consideration of the deed to Moore, that can only affect the right of the grantee to hold all the property conveyed; his lien is good to the extent of his debt. A deed, fraudulent in law, cannot be made the ground of legal title: it will be regarded in the law forums, as either good or bad, but it is otherwise in equity; there, it will be considered as a security for so much as was paid for it, and void so far as it appears to have been voluntary. Wm. S. Paine was only performing a moral duty in securing the debt of the plaintiffs, and however fraudulent his intentions may have been as it respects others, the plaintiffs right to the security he gave them, is unquestionable as against him; and the defendant Tarlton, having acquired only such title as he had, does not occupy a situation more favorable: *Boyd v. Dunlap*, 1 Johns. Ch. Rep. 478; *Sands v. Codwise*, 4 Johns. Ch. Rep. 536: See 2 Sch. & Lef. Rep. 492; 8 Ves. Rep. 283; 2 ib. 516; 1 Vern. Rep. 465; *Atherly on Mar. Sett.* 173; *Brown's C. & A. Law Ch.* 1 Sec. 3, page 87, *et seq.*

No counsel appeared for the defendants.

COLLIER, C. J.—By the second section of the act “to prevent frauds and perjuries” it is enacted that every gift, grant, or conveyance of lands, tenements, &c. made and contrived of malice, fraud, covin, collusion or guile, to the intent, or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, &c. shall be henceforth taken as against the person or persons, &c. whose debts, suits, &c. by such guileful and covinous devices and practices as is aforesaid, shall or might be any wise disturbed, hindered delayed, or defrauded, to be clearly and utterly void. Aik. Dig. 207. This enactment is substantially a transcript of the statutes of the 13th and 27th Eliz. so far as the rights of creditors and purchasers are concerned, and like the former, avoids *in toto*, all conveyances made to defraud creditors, without reimbursing the fraudulent grantee to the prejudice of the creditor, the consideration he may have paid.

In *Sands, et al. v. Codwise, et al.* 4 Johns. Ch. Rep. 436, it was held that conveyances made to defeat creditors are void, not only by statute, but by the common law; and if void, on the ground of a positive fraud they are void, *ab initio*. And

in *Wadworth v. Marsh*, 9, Conn. Rep. 481, it was said that the validity of a conveyance does not depend entirely upon the consideration received, but upon the intent of the parties. Where the intent appears to have been to defraud, the conveyance is not merely voidable, but utterly void, as against the creditors of the grantor. Hence, it is frequently declared that it is not sufficient that a conveyance be upon valuable consideration, or *bona fide*. It must be both, and therefore if a conveyance be defective in either particular, though operative between the parties and their representatives, it is utterly void as to creditors. 1 Story's Eq. 346, 363; *Twine's case*, 3 Co. Rep. 81.

In the case before us, the plaintiffs do not explicitly admit that the deed from Wm. S. Paine is fraudulent within the meaning of the statute, but their application to equity for relief proceeds upon the idea, that their deed cannot be sustained at law, because it is absolute in its terms, while it is intended merely to stand as a security for a debt not greater in amount than one-fifth of the consideration expressed on its face. In this view of the case, is it competent for chancery to subject the property conveyed to the payment of the plaintiffs demand, against one who occupies the position of both creditor and purchaser? It is not pretended that there was a mistake in the drawing of the deed, or that it is in any manner different in its terms from the intention of the parties, but it is impliedly conceded that upon a trial at law, the plaintiffs could not recover. The transaction itself, showing the absence of that *bona fides*, which is essential to the validity of conveyances, intended to operate against creditors.

No case has ever come under our notice, in which relief has been afforded to a grantee under similar circumstances. Equity, instead of being more tolerant in cases of bad faith, will look with a more searching eye, and will act upon all badges of fraud and presumptions of ill faith which are recognised at law, and even goes farther in denouncing fraud. Mr. Justice Story says "it is by no means to be deemed a logical conclusion, that because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a Court of Equity; for a Court of Equity recognises a scrupulous good faith in transactions, which the law might not repudiate. It acts upon conscience, and does not content itself

with the narrow views of legal remedial justice," 1 vol. of Eq. 366. Without extending this course of remark further, we think it may be safely assumed that a Court of Chancery will not lend its aid to a grantee, so as to give him the benefit of a deed, which a Court of Law would consider fraudulent *in fact*.

The case of *Boyd & Suydam v. Dunlap, et al*, 1 Johns. Ch. Rep. 478, is entirely unlike the present. In that case, a bill was filed by the creditors, to set aside a conveyance of real and personal property, upon the allegation that it was voluntary and without consideration, and made fraudulently to defeat the creditors of the grantor. The conveyance was made from a father to a son, to whom the father was indebted in a sum equal to about two-thirds of the value of the property conveyed; it also appeared, that the father told the son, on his coming of age, about five years before the conveyance was made, that he should have the whole of his property if he would stay with him and take care of his parents in their old age. The Chancellor said he did not discover such traces of actual and direct fraud as warranted him in directing the conveyance of the real estate to be delivered up and cancelled, as absolutely null and void. "There is a marked difference between an interference actively to compel a party to re-convey or surrender a deed, and a refusal to aid a party who seeks a specific performance of a contract. If actual fraud be not clearly and satisfactorily made out, the Court may refuse its aid, but will not take so decisive a step as setting aside, *in toto*, the assumed title, but will make it subservient to the equity of the case, or leave the party complaining, to his remedy at law against a contract founded on inadequacy of price, or other suspicious circumstances." Again: "A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of re-imbursement or indemnity; but it is otherwise, with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent." Here was a proceeding by creditors, to set aside a deed upon the allegation of fraud, but in the case at bar, the bill is filed by the grantee against creditors to set up and sustain a deed to the extent of the grantee's demand, upon the implied admission, that it would be regarded at law, as fraudulent, and defeated *in toto*. While the case cited rests upon familiar principles of equity, the case we are considering

has no warrant, either in principle or authority, so far as our researches extend.

But it is insisted that the plaintiffs should be relieved in chancery, because a court of law, would regard the deed as either good for the whole, or entirely void, and that if they failed in an action to recover possession, they would loose the entire benefit of their security. This argument has already been answered. If the deed is fraudulent in fact, no Court can aid them; if it is founded upon a valuable consideration and *bona fide*, it would be evidence in an ejectment or trespass, to try titles, and until its validity has been affirmed by the verdict of a jury, the plaintiffs cannot recover on it in equity; for it is a well settled principle in that Court, that a party who seeks the specific performance of a contract, must present a case free from suspicion or unfairness. This principle will apply with all force, where a deed is sought to be made effectual against creditors, by suit in chancery.

We have not thought it necessary to notice the answer and proofs, as the cause in our opinion might have been dismissed for want of equity in the bill; and without adding any thing further, we have only to say, that the decree must be affirmed.

BETHEA v. MCCALL, *pro. ami.*

1. A suit may be brought by a *prochein ami*, without first obtaining leave of the Court.
2. It can not be objected, on error, that no issue has been tried, when the record shows that an issue was submitted to the jury, although no plea appears in the record.
3. Proof that a deed for land was made in 1824, by the defendant to the plaintiff, and given to the mother of the plaintiff, an infant, for safe keeping, who ten years afterwards, was married to the defendant, and that notice had been given to the attorney of the defendant to produce the deed. On the trial—*held*, sufficient to authorise proof of the contents of the deed, by secondary evidence.
4. Proof by the subscribing witness to a deed, that he subscribed in 1824, as a witness, a deed of gift for lands made by the defendant to the plaintiff—that the land was described in the deed by its proper designation as part of the public lands, but he was then unable to say, from his recollection of the contents of

the deed, what it was—that the defendant, at the time of making the deed, stated that the lands conveyed were those on which Daniel McCall had resided, and by another witness, that the land on which McCall resided was that sued for—*Held*, competent evidence in an action against the grantor—no question being raised on the trial as to its *sufficiency*.

Error to the Circuit Court of Lowndes.

THIS was an action of trespass to try title, by the defendant against the plaintiff in error. The plaintiff below obtained a verdict, and judgment was rendered thereon.

By a bill of exceptions, it appears that the deed under which the plaintiff claimed, was alleged to have been lost, and was not in the possession of plaintiff, and to lay the foundation for proof of its contents, a witness was examined, who deposed that he was a subscribing witness to a deed made by the defendant to the infant plaintiff, in the year 1824, and delivered to him, and then placed in the hands of the mother of the infant, who was then a widow, for safe keeping; that she intermarried with the defendant in the year 1834, and that for the greater part of the time between 1824 and 1834, the defendant resided out of the State. The plaintiff also proved that a notice was served on the defendant's attorney, to produce the deed—which being all the evidence on this point, the defendant objected that it was not sufficient, as it did not show that the defendant was entitled to the custody of the deed, nor was it traced to his possession. But the Court overruled the objection, and permitted parol evidence to be given of the contents of the deed, to which the defendant excepted.

To prove the contents of the deed, the plaintiff introduced a witness who swore that he was a subscribing witness to a deed of gift for lands made by the defendant to the plaintiff; that the land was described in the deed by designating the quarter section, township and range, but the witness was unable to designate and describe the lands conveyed according to the description in the deed, and stated, that at the time of making the deed, and after it was delivered, the defendant stated that the lands he had given by the deed, were those on which Daniel McCall had resided in his life time. A witness was then called, who deposed that the lands on which Daniel McCall had lived, were those described in plaintiff's declaration, and

sought to be recovered. The defendant's objected to this mode of establishing the contents of the deed, but the evidence was admitted, to which the defendant excepted, and now assigns for error,

1. Because it does not appear by what authority Solomon McCall acted as next friend of the plaintiff.

2. Because an infant cannot prosecute his suit by guardian or next friend, appointed by the Court.

3. Because parol proof is incompetent to establish the execution of a voluntary deed for land, in a suit by the grantee against the grantor.

4. That the notice to the attorney of the defendant, was not under the circumstances of this case, sufficient.

5. In receiving parol evidence of the contents of the deed, as set forth in the bill of exception.

6. In admitting the declarations of the defendant of the description of the land.

7. Because there was no issue tried by the jury.

8. Because there was no proof of the interest of the plaintiff in the deed, whether it was a term of years or the fee.

9. Because there was no sufficient evidence of the loss of the deed.

10. Because there was no proof of consideration.

WILLIAMS, for plaintiff in error, cited 1 Johns. C. Rep. 273; 18 Johns. 331; 1 Phil. Ev. 433, 452.

Cook, contra, cited 8 Porter, 529; 9 ib. 39; 1 Ala. Rep. 121.

ORMOND, J.—The first and second assignments of error are founded on the supposition, that an infant cannot commence a suit by his next friend, without first obtaining an order of Court for that purpose. The right of an infant thus to sue, is expressly given by statute. Aik. Dig. 279, § 118. And it cannot be doubted that it was the design of the legislature to authorise suits to be commenced in this mode, without first obtaining leave of the Court, as the infant might be otherwise seriously prejudiced. After the suit is thus commenced, the *pro-chien ami* will be restrained by the Court from doing any thing to the prejudice of his ward, and may be removed by the Court. See Isaacs v. Boyd, 5 Porter, 388.

This Court has repeatedly held that no objection can be taken here, for want of a formal issue, if it appears from the record that the parties appeared, and submitted their cause to the jury. In this cause, it appears that the parties appeared, and that a jury was empaneled to *try the issue joined* between them, and that the jury found the defendant guilty of the trespass. This, according to repeated decisions of this Court, is sufficient, although no plea appears in the record.

The remaining points presented by the assignments of error, are, first, whether the preliminary proof was sufficient to authorise the introduction of secondary evidence of the contents of the deed, under which the plaintiff claimed title.

Second, whether the evidence admitted to prove the contents of the deed, was competent evidence, or in the language of the bill of exceptions, whether the contents of the deed "could be established in that mode."

1. The preliminary evidence offered to lay the foundation for secondary proof of the contents of the deed, was the testimony of the subscribing witness, who swore that a deed was made in the year 1824, by the defendant to the plaintiff, delivered to him, and then deposited with the mother of the infant for safe keeping; that in 1834, the defendant married the mother of the plaintiff, and that notice had been served on the attorney of the defendant, to produce the deed. This was in our opinion, sufficient to authorise the introduction of the secondary proof. In *Mordecai v. Beall*, 8 Porter, 529, and in *Jones v. Scott*, 2 Ala. Rep. 58, this Court, at some length, laid down the rules which govern this inquiry, so far at least, as the question is susceptible of being regulated by fixed and ascertained rules; for, to a great extent, every case must depend on its own circumstances. The principal points for the consideration of the Court in such cases are, first, was the supposed lost instrument, once in existence. Second, is it lost, destroyed, or in the possession of the opposite party. And, third, has the party wishing to rely on it, done every thing in his power to produce it.

No doubt can be entertained that the deed once existed, and was in the possession of the mother of the plaintiff, and now the wife of the defendant. It is not pretended that it was ever re-delivered to the infant plaintiff, or to any one in trust for

Betha d. McCall, *pro. ami.*

him, and it must therefore be presumed to be where it was originally placed for safe keeping. Being in the custody of the wife upon her marriage with the defendant, it passed under his control, and in legal contemplation, is in his possession; the legal existence of the wife being merged in that of the husband during the coverture.

It is, however, supposed that the notice to produce the deed should have been given to the defendant himself, and that notice to his counsel was not sufficient, as it is not shewn that the deed was in his possession.

Independent of the general practice of notifying parties to the suit through their attornies, with whom they are presumed to be in correspondence, this matter is regulated by statute. Aik. Dig. 280, § 123, where it is provided, that notice to the attorney of record, shall be notice to the party whom he represents.

The remaining question relates to the evidence offered, to prove the contents of the deed. This was the evidence of the subscribing witness, who testified that in 1824, he subscribed as a witness, a deed of gift for lands made by the defendant to the plaintiff, that the land was described in the deed by its proper designation, as part of the public lands, but he was then unable to say from his recollection of the contents of the deed, what it was: that the defendant stated at the time of making the deed, and after it was delivered, that the lands he had given by the deed, were those on which Daniel McCall had resided in his life time, and a witness was then called, who proved that the lands on which Daniel McCall had lived, were those described in the declaration, and sought to be recovered in this action.

It is now objected by the counsel for the plaintiff in error, that this was not sufficient proof of the contents of the deed, to authorize a recovery; that it does not appear what estate the plaintiff had in the lands, whether the fee simple, or only a term of years, or for the life of another, and therefore, it may be, that the estate is at an end. We will not undertake to say that these objections, if further proof could not have been adduced, would not have been decisive in favor of the defendant, but the objection raised in the Court below, was not to the quantity, but to the quality of the evidence. It was not a motion for in-

structions to the jury, that the evidence did not sustain the action, but it was an objection to the evidence itself. The defendant objected to this *mode* of establishing the contents of the deed, is the language of the bill of exceptions; which in other words, is an objection to the competency of the evidence, and that is the only question which can be raised here.

When the contents of the instrument is to be established by secondary evidence, if no written copy exists, it must of necessity, be by parol proof; and this is submitted to from the necessity of the case. As the witness to the deed was unable, after such a lapse of time, to swear to a part of the contents of the deed, the description of the land, the Court permitted evidence of the declarations of the defendant, at the time the deed was made, to be given in evidence to identify the land conveyed, and to this we can see no objection in this case; the action being against the grantor himself. It is not necessary to say what should have been the decision, if the suit had been against a third person; being against him, it was certainly competent. As to the evidence itself, it is perhaps more satisfactory than if the witness had undertaken to swear to the precise description of the land in the deed, as that would be much more apt to fade from the memory than a description of it by reference to a former owner of the land. We are entirely satisfied that the evidence was competent, and if not quite so, satisfactory as could have been desired, the objection comes with a bad grace from one who could have removed all doubts by the production of the deed.

Let the judgment be affirmed.

HALLET & WALKER EX'RS, &C. v. O'BRIEN.

- 1 When the facts of a case show that a witness stands in such a relation to the parties to a suit, that he will be liable precisely to the same extent to the unsuccessful party, his interest is balanced and he is therefore competent.
2. The plaintiff, to prove his demand for work and labor, introduced a witness, who is the person by whose direction the work is done; it appeared that the witness was himself under contract to do the same work for the defendant's testator. The interest of the witness is balanced because he is liable to the unsuccessful party, whatever it may be—to the plaintiff for the work done—and for his failure to perform his contract with testator.

Writ of error to the County Court of Mobile county.

ASSUMPSIT for work and labor. The pleas pleaded by the defendants, do not appear in the transcript, but it does appear that a trial was had on an issue submitted to the jury.

In the progress of this trial, the plaintiff, O'Brien, offered one Keho, as a witness, to whom the defendants objected, supposing him to be incompetent, on account of interest. To establish his incompetency, they gave in evidence an instrument in writing, signed by the witness and Joshua Kennedy, the defendants testator, by which it appeared that the witness had agreed to fill up a certain lot in the city of Mobile, in a certain manner, for a certain price, to be paid by Kennedy on the completion of the work. They also gave in evidence another instrument, signed by the witness and another person, which acknowledged the receipt from Kennedy, of the full price agreed to be paid by the former contract. This stated that the work was not completed, and contained an agreement to complete the job within two months after a certain barrier should be placed on the lot by Kennedy.

It further appeared, from the statement of the witness, that some time after the barrier was finished, Kennedy called on the witness, and wished him to go on with the work. The witness said he had quit the business, and sold his carts, but could procure the plaintiff to do the work. Kennedy then said it was immaterial to him who did it; that the plaintiff agreed to do the work on the procurement of the witness, but that

Kennedy was to pay the plaintiff, and not the witness; that Kennedy did agree and admit that he was to pay the plaintiff for the work. The Court overruled the objection to the witness, who was admitted to give evidence, and the defendant excepted.

A verdict was found, and judgment rendered thereon for the plaintiff, which the defendants now seek to reverse for the supposed error, in admitting this witness to give evidence.

Other questions were likewise presented by the assignments of error, but were not pressed in the argument, and are unnoticed in the opinion of the Court.

STEWART, for the plaintiff in error, cited 1 Phillips on Ev. 130; 3 Camp. 317; 4 Mass. 653; 8 Cowen. 60; 1 Cowen, 535.

He insisted, that as soon as the interest of the witness appeared, that it could not be removed by any statement made by him.

CAMPBELL, contra, cited 5 Ohio R. 424; 9 Cranch, 39; 5 Mason, 241; 12 Eng. C. L. R. 32; 16 John, 95.

GOLDTHWAITE, J.—We fully agree with the counsel for the plaintiff in error, that it would be improper to permit a witness to disprove his interest, when that is once established, but in this case, the interest did not appear from the mere inspection of the writings given in evidence; these established nothing more than the fact that a contract had been made by the witness to do a particular job of work; that this work was the same, for a portion of which the plaintiff sought a recovery, no where appears except from the statement of the witness. Whether this statement, connected with the written evidence, showed a disqualifying interest, is the matter to be now examined.

We think the fair conclusion to be deduced from what the witness said, is, that he employed the plaintiff to do the work, and it is not an unreasonable inference that Kennedy's name was not then disclosed. Having thus made the contract with the plaintiff without disclosing the name of Kennedy, even if it is admitted that he was his agent, he became personally responsible, and therefore is interested on this side of the case, as

shewn by the decision cited from Campbell. *McBrain v. Fortune*, 3 Camp. 317.

But let us examine and see how his interest stands on the other side. Should the plaintiff recover, he then becomes responsible to the defendants, as the executors of Kennedy, for the precise sum they shall be compelled to pay for doing the work, which it is admitted the witness was bound to perform. It seems to us impossible to escape from this conclusion; and we must hold the witness to stand indifferent between these parties, because he is liable precisely to the same extent, to whichever of them is unsuccessful.

And this brings the case within the influence of the perfectly well recognized principle, that if the interest of the witness is equally balanced between the parties, he is competent. *Hudson v. Robinson*, 4 M. & S. 475; *Ridley v. Taylor*, 13 East, 175; *Evans v. Williams*, 7 Term, 480; *Ilderton v. Atkinson*, ib. 481; *Shuttleworth v. Stephens*, 1 Camp. 407; *Milward v. Hallett*, 2 Caines, 77.

We are compelled to admit that we cannot distinguish the principle decided in the case of *Everton v. Andrews*, 4 Mass. 653, from the case we have just now considered, but we must decline our adoption of it, because it seems entirely at variance with well established rules. In doing this, we are supported by the opinion of the Supreme Court of New-York, in *Marquand v. Webb*, 16 John. 88, in which the Massachusetts case is examined, and denied to be law.

The other points made in this case have been examined, and do not call for a written opinion.

Let the judgment be affirmed.

FENNO, *et al.* v. SAYRE & CONVERSE.

1. A bill for the foreclosure of a mortgage executed for the security of a promissory note, is not demurrable because the note is not exhibited, although there may be other defendants than the mortgagor himself.
2. Where a bill was filed to foreclose a mortgage and for general relief, against the mortgagor and other incumberancers, upon the assumption that the complainant's lien is paramount; although this assumption is false, the bill will not be defective for omitting to offer to pay to the superior incumberancers, what may bedue them.
3. An allegation in a bill, that the complainants were proprietors of a note intended to be secured by the mortgage sought to be foreclosed, is sufficient, though it does not appear how they became proprietors.
4. The interest which a purchaser of land acquires, who has paid part of the purchase money, and taken a bond to convey the title upon the payment of the residue, may be sold or mortgaged; but the sub-purchaser, or mortgagee will take it subject to the equitable lien of the first vendor.
5. The registry of a deed for land, executed by a person not in possession, or who does not appear from the records to have had any connection with the title, will not operate as a notice to a subsequent purchaser.
6. A derivative purchaser without notice, cannot be affected by a notice to his immediate vendor; and if he purchases with notice he may protect himself by the want of notice in such vendor. So, although a purchase founded on a gaming consideration is void as between the parties, or in favor of a *bona fide* purchaser without notice, yet if a third person become the purchaser from the winner for a valuable consideration, without notice of the manner in which he became the proprietor, the title of such person will be valid.
7. Where the complainants allege that the contract by which the defendant acquired the conveyance of land was founded on a gaming consideration, and the defendant denies it in his answer, the allegation may be sustained by the testimony of witnesses.
8. The complainants as against L. one of the defendants stated, that they have been informed he claims some interest in some part of the lands in question, but will not assert that it was founded on a usurious or gaming consideration. They further state, that all the defendants acted with a full knowledge of their rights, and that they caused their mortgage to be recorded &c., before any of defendant's rights attached. On these statements they call on L. to set forth his contract &c.—when the same took place—the amount of money paid &c.—whether any part of the consideration of his payment was founded in usury, or gaming &c.—*Held*, that the interrogatories were authorized by the allegations, and that the answer of L. responsive to them, was evidence.
9. Usury is a defence personal to the party agreeing to pay it, or those who stand in his place as representatives.
10. Where a conveyance of land was induced by money lost at gaming, and also cash paid, although the contract is void, yet equity and moral justice require that the purchaser should be reimbursed the cash paid, before his title will be divested in favor of a prior incumberancer who was not in possession and whose mortgage was not registered.

This cause comes here by writ of error from the Court of Chancery sitting at Cahawba.

THE defendants in error filed their bill against Wm. K. Paulling, Benjamin Glover, George W. Fenno, Columbus W. Lea and Messrs Cook & Kornegay, alleging that Paulling was indebted to them in the sum of nine thousand six hundred and thirty-five dollars and eighty-five cents, by promissory note, dated the thirty-first of May, 1837, and payable eighteen months thereafter, to Lewis W. Pond or bearer, at the Mobile Bank; and that to secure the payment thereof, he executed to them a mortgage in fee of certain lands situate in the county of Perry. The lands thus mortgaged, are particularly described in the mortgage which accompanies and makes part of the bill, as the south-west quarter of section seventeen, township sixteen, in range six; the west half of the south-west quarter of section eight, township sixteen, in range six; the west half of the north-west quarter of section seventeen, township sixteen, in range six; the west half of the north-east quarter of section twenty, township sixteen, in range six; the north-east quarter of the north-east quarter of section nineteen, township sixteen, in range six; the south-east quarter of the north-east quarter of section nineteen, township sixteen, in range six; the west half of the south-west quarter of section twenty, township sixteen, in range six; the west half of the north-west quarter of section eight, township sixteen, in range six; the north-west quarter of section twenty, township sixteen, in range six; all in the district of lands subject to sale at Cahawba.

The complainants further state, that at the time of the execution of the mortgage, Paulling held a bond from Benjamin Glover, conditioned to make title to the lands mortgaged, upon the payment of a certain sum of money therein specified; the greater part of which had been paid, and the residue Paulling undertook to pay, and obtain complete titles.

It is then stated, that in February or March, 1838, Paulling, in a course of gaming with George W. Fenno, lost a large sum of money, and with a view to settle his losses, transferred to the latter, Glover's bond, for title to the land in question; and in April or May, 1838, Fenno procured a title to be made to him by Glover.

The complainants also allege, that in 1838, or '39, Messrs Cook & Kornegay, a mercantile firm of Tuscaloosa, lent to Fenno a sum of money, as they are informed and believe, at a usurious rate of interest, and in order to secure its repayment, received from him a mortgage on the lands conveyed to him by Glover. That Paulling was in the possession during all the time the transaction between Fenno and Cook & Kornegay, was in a course of consummation; and the latter were fully informed of the complainant's lien. And further: the complainants have been informed and believe, that Fenno has tendered to Cook & Kornegay, the principal and interest, and demanded a reconveyance of the land.

It is further alleged, that Columbus W. Lea claims some interest in a part of the land, but under what circumstances he received a conveyance, the complainants are not prepared to state; but they charge that Glover, Fenno, Paulling, Cook & Kornegay, and Lea, all, at the time of the transactions in which they participated, were fully informed of their lien.

Each of the defendants are called on to answer the facts charged against them, and particularly to disclose the circumstances under which they became interested in the lands in question. The bill prays that the defendants may set forth all papers under which they claim, and whether any other persons are interested in the land; and especially that the title bond, or a copy from Paulling to Glover, if in existence, may, with all indorsements thereon, be exhibited: And further, a divestiture of the titles of the defendants, so far as they may be in conflict with the paramount claim of the complainants; that process of *subpœna* may issue, and for general relief.

Fenno, Cook & Kornegay, and Lea, answered the bill, and on the petition of complainants, it was dismissed as to Glover, and leave given to take his testimony, and taken as confessed, as to Paulling.

Fenno claims the benefit of a demurrer in his answer, and denies that he had any knowledge of the complainant's mortgage, until long after he had purchased and paid for the lands in question; and as he has not seen the note and mortgage, he cannot admit their existence, but insists that they may be proved, as also the registration of the latter. He admits that Glover had a good title to the lands, and insists that he purchased

Paulling's right to the same on the 23d of January, 1838, and received the title bond of the former, transferred by the latter on that day. That there was then due from Paulling to Glover, on account of the purchase of the land, the sum of twenty-five hundred dollars, which he paid in March, 1838, besides about two hundred dollars interest, and the costs of a suit which had been brought for the recovery of the debt by Glover against Paulling; and thereupon Glover and wife executed a deed conveying to him the land in fee simple. At the time this defendant made the purchase from Paulling, the mortgage to the complainants had not been recorded, nor did this defendant have actual notice thereof, until after he received the deed from Glover and wife; and having paid a valuable consideration for the land, he insists that he is a *bona fide* purchaser for a valuable consideration without notice, and as such, entitled to the protection of equity.

The defendant protests against the right of the complainants to call on him to answer as to a course of gaming between Paulling and himself, and submits to the Court whether he shall respond to that charge. He denies that the bond of Glover was transferred to him for the purpose of settling the losses of Paulling, and avers that the consideration moving from him to the latter, was ten thousand dollars, paid as follows: twenty-seven hundred dollars, or thereabouts, amount due Glover from Paulling, including interest and costs; a negro man for fifteen hundred dollars; a promissory note on Dr. Leland, for fourteen hundred dollars; one hundred and twenty-five dollars for a gin; four hundred and thirty-four dollars in a note of this defendant, which he has since paid in cash, and the balance in a debt due and owing by Paulling to this defendant.

The defendant admits that he executed a deed in trust on a part of the land, to secure a debt to Cook & Kornegay, but he insists that that deed was executed in good faith, and the complainants have no right to inquire, whether the debt due to the *cestui que trust* by the defendant, was for a loan of money at a usurious rate of interest; He further states that the deed for the benefit of Cook & Kornegay, was executed long before he had any notice of complainant's mortgage.

The defendant also admits that he sold to Columbus W. Lea, one hundred and sixty acres of the land at ten dollars *per acre*,

and conveyed the same to him before he had any notice of the complainant's mortgage.

Cook & Kornegay, in their joint answer, state, that on or about the 16th of May, 1839, the defendant, Fenno, became indebted to them in the sum of five thousand and fifty dollars, and executed a deed of trust, with a condition of sale, on a plantation containing six hundred and forty acres, situate in the county of Perry, for the purpose of securing the payment of that debt; which deed has been duly recorded. At the time of the execution of the deed for their benefit, they had no notice of any incumbrance on the land conveyed; they knew Glover had been the legal proprietor thereof, and a regular conveyance from him to their grantor, was shown to them. They exhibit a copy of the deed of trust, and pray that the same may be taken as a part of their answer, which bears date the sixteenth day of May, 1839, being the same day on which Fenno's note to these defendants was made.

These defendants admit, that Fenno's indebtedness to them is founded on a loan of money by them to him, but they insist that the complainants cannot require them to discover the rate of interest which he was to pay them. They deny that Fenno has ever offered to pay them any part of the sum he owes them, or demanded of them a reconveyance of the land conveyed in trust for their benefit; and insist the registration of the complainant's mortgage, was not constructive notice, so as to defeat their claim.

Columbus W. Lea states, that on the 29th of March, 1838, he purchased of Fenno one hundred and sixty acres of the land undertaken to be conveyed by the mortgage from Pauling to the complainants, for which he paid Fenno in cash, the sum of sixteen hundred dollars. That his purchase was in good faith, untainted with usury or gaming, and without notice of a prior incumbrance. On the same day, without notice of the claims of others, he received a conveyance in fee simple, and caused it to be duly recorded in the office of the clerk of the County Court of Perry county, on the 25th of July, 1838, a copy of which he exhibits with his answer, and prays that it may be taken as a part thereof. To this answer the complainants filed a formal replication.

By a comparison of the deeds exhibited, with the answers of

Cook & Kornegay, and the defendant Lea, it appears that the lands conveyed to them, are the same as those embraced by the mortgage of Paulling to the complainants.

Testimony was taken, as well at the instance of the complainants as the defendants, which will be briefly stated, so far as it influenced the judgment of the Court.

Benjamin Glover (examined at the instance of the complainants) proves the sale of the lands in question to Paulling, as admitted by the pleadings; states the last payment for the same was made to him in 1837, by Fenno, who produced the bond he had given to Paulling, transferred to himself; and thereupon he conveyed to him the fee simple estate. Witness asked Fenno how he acquired the bond, to which he answered that he had been engaged with Paulling at a game of cards in Tuscaloosa, when the latter put up the land at sixteen thousand dollars, and he won it. The contract of sale was made between Glover and Paulling about five years previous to December, 1840; the latter took possession a short time after the contract was made, and retained it about two years.

J. A. Campbell, a witness for the complainants, proves that the complainants held notes on the defendant Paulling, one for twelve thousand dollars, to which Benjamin Glover and John Shields were parties, and two others, amounting in the aggregate to seven thousand dollars. On the first bill, a judgment was obtained at the spring term of the federal Court holden in 1837, against either Glover or Shields. It was agreed in May, 1837, as witness believes, that the debt should be settled; that two notes should be made for a part of it, to which Glover and Shields should be parties, and that the balance should be secured by mortgage. The settlement was thus made the evidence of indebtedness surrendered to Paulling, and in lieu thereof, the two notes of Paulling, Glover and Shields, and the mortgage now sought to be foreclosed, made and delivered to the complainants. Witness believes that complainants were proprietors of the note on which the mortgage is founded, on the 10th of December, 1839, as it was delivered to him for collection, on or about that day; that he knew or heard of no consideration having passed between Paulling and Lewis W. Pond, the payee of the note, or Pond and the complainants; he treated the note as the property of the complainants, and drew the

mortgage accordingly. From the terms in which the mortgage was drawn, he considers that Paulling was bound to obtain a title to the lands, free from incumbrances.

John C. Cabiness, a witness for the complainants, testifies that he has seen Fenno and Paulling playing at cards, when they were alternately loser and winner. Heard Fenno say, that he had beaten Paulling, and understood Paulling let him have a tract of land which he had purchased of Glover; but heard Fenno say, that he had to pay Glover twenty-seven hundred dollars, or thereabouts, before he could obtain possession, in addition to which, he had let Paulling have money and other property. The lands he understood, were situate in Perry county. Understood that Cook & Kornegay lent Fenno, five or six thousand dollars, and took a mortgage on a part of the land. The loan consisted in part, either of a bill on the north, or of a bill of Cook & Kornegay, and about one thousand dollars in Brandon bank bills, which were selling at a discount of thirty or forty *per cent*. Does not know the rate of interest charged, but understood it was large. Has heard Fenno say, that he had paid part of Cook & Kornegay's demand. Has heard both Fenno and Cook & Kornegay, express surprise at the lien set up by the complainants, and thinks they were all ignorant when the transaction took place between them, of its existence.

Jesse B. Nave, a witness, examined at the instance of the complainants, testifies that the mortgage from Paulling to the complainants, was recorded in the office of the clerk of the County Court of Perry, on the 29th of January, 1838, and to his deposition, attaches a copy of that mortgage, with a certificate of its acknowledgment and registration.

Other testimony was taken at the instance of the complainants, which is either confirmatory of that stated, or not noticed in the opinion of the Court.

John C. Cabiness, a witness, examined at the instance of the defendants, testifies that a mutilated paper, which professes to state the contract for the sale of the land from Paulling to Fenno, is written and subscribed in the hand writing of the former. That in the fall of 1837, as well as witness remembers, Paulling and Fenno played at cards in Tuscaloosa; that during, or after the game, the former proposed to transfer the land to the

latter, and in payment of the money lost at the game, and for other considerations did actually transfer it to Fenno. The land, he thinks, was estimated in the settlement, at twenty-five thousand dollars, the greater part of which was won by Fenno of Paulling. The witness heard the paper proved by him, spoken of in February, 1838, but is not certain whether he then saw it.

Lewis W. Pond, examined for defendants, states that the complainant, Converse, and himself, were co-partners in the mercantile business, in the city of Montgomery, from 1828, or '29, up to 1835, when Converse withdrew from the firm, selling his interest to others. During the continuance of the partnership, witness resided abroad, and the business was conducted by Converse in this State, who informed witness, that in liquidation of debts due the concern, he took many notes payable to witness alone, so as to enable him to sue in the Federal Court. Witness exhibits with his deposition, and verifies the copy of a paper, which states that Converse, in April, 1838, sold to him all his, Converse's interest, in the debts due their late partnership. He supposes the note which the mortgage to the complainants was intended to secure, was for a debt due Pond & Converse, and claims it under the agreement.

Witness never saw the note; had no dealings with Paulling, and no consideration ever passed from him to Paulling; nor does he know on what consideration it is founded; but he has heard of it, and that it was sued in the Federal Court at Mobile or Tuscaloosa, in his name.

Other facts are shown by the proof in the cause, but their recital is not necessary to the understanding of the points of law considered by the Court.

At the January term, 1841, of the Chancery Court, the cause was argued on a demurrer to the bill, and on a motion to dismiss for want of equity; but the bill was sustained. At the July term following, the cause was heard on bill, answers and proof. The Chancellor was of opinion that the contract between Paulling and Fenno, was void, because founded on a gaming consideration; that the mortgage to the complainants being recorded before the payment of the balance of the purchase money to Glover, Fenno, Cook & Kornegay, and Lea, are chargeable with a constructive notice of its contents. And

thereupon the Chancellor referred it to the master to ascertain what was due to complainants upon their mortgage, for principal and interest, and to tax their costs; and decreed that the defendants pay to the complainants what shall be reported due, &c. within one month after the same shall have been ascertained. In default of such payment, the defendant's equity of redemption is declared to be foreclosed, and a sale of the mortgaged premises is directed to be made, &c. and the money arising from the sale is to be appropriated in the first place, to pay and satisfy the amount due complainants, with costs, and the residue, the master was directed to retain, subject to the further order of the Court. The lands were directed to be sold in two several parcels, viz: the part claimed by Lea in one, and the part mortgaged to Cook & Kornegay, in another.

T. WILLIAMS and G. W. GAYLE, for the plaintiffs in error. The bill was demurrable, and should have been dismissed for want of equity. The answer of Fenno denies that the transfer of Glover's bond was induced in consideration of Paulling's losses at an unlawful game, and cannot, under the statute, be contradicted by proof. Aik. Dig. 286; 7 Porter's Rep. 251; 1 Story's Eq. 89, 91. If, however, the answer could be assailed, it is not overbalanced by the proof in the record; and besides, no one who was not a party to a contract tainted with gaming, can be heard to allege its illegality.

But the contract between Paulling and Fenno, was executed and legal titles transferred by Glover to the latter, so that even Paulling would be concluded, if the contract was in its inception illegal. 2 Stw't & P. Rep. 250. If, however, the transaction between Paulling and Fenno was tainted with gaming, and Sayre & Converse could allege it, yet Fenno is entitled to be refunded, all money or property he may have parted with in good faith. Fleetwood v. Jansen, *et al.* 2 Atk. Rep. 467; Skipwith v. Strother, 3 Rand. Rep. 214.

The mortgage from Paulling was invalid in its origin, as a security for money, because he had neither the legal or equitable title to the lands; the title continuing in Glover until the purchase money was paid him. 1 McCord's Ch. Rep. 278.— But if Paulling had a right subject to be mortgaged, Glover

had a paramount right to the balance of the purchase money, and could look to the land for his indemnity; and Fenno, who has paid the money under a contract with Paulling, must be substituted to the rights of Glover. 4 Bibb's Rep. 47; 5 Porters's Rep. 452; 6 Johns. Ch. Rep. 404.

Fenno's equity commenced on the 23d January, 1838, and this was before the complainant's mortgage was recorded; the paper proved by Cabiness shows this, and in the absence of opposing proof, must be regarded as *prima facie* true. The date of a deed or other writing, like every part of it, will be intended to be truly expressed. 3. Phil. Ev. 453, C. & H's notes.

If Fenno had notice of the mortgage to the complainants, neither Lea nor Cook & Kornegay, can be thereby affected; they can only be reached by a notice, actual or constructive. 3 Johns. Ch. Rep. 147; 1 *ibid.* 213; 1 Paige's Rep. 492; 1 Dess. Rep. 323. And the registration of that mortgage will not be regarded as constructive notice to them. 1 Johns. Ch. Rep. 566, 3 J. J. Marsh. Rep. 558.

The answers of all the defendants who answered, are responsive, either to the allegations of the bill, or to interrogatories proposed to them, and to entitle the complainants to relief, they must be disproved. 1 Gill & Johns. Rep. 270; 1 Har. & Johns. Rep. 301; 1 Call's Rep. 224; 2 Wheat. Rep. 380; 1 Paige Rep. 239; 3 Wend. Rep. 532; 2 Johns. Ch. Rep. 92; 1 Dess. Rep. 134; 9 Cranch's Rep. 153; 1 Bibb's Rep. 253; 1 Day's Rep. 156; 3 Hayw. Rep. 192; 1 Cow. Rep. 711; 4 Paige's Rep. 368; 3 Wheat. Rep. 527; 10 Johns. Rep. 525.

So the proof is defective in not showing an indebtedness by Paulling to the complainants, as against Lea, and Cook & Kornegay; and the evidence of Pond negatives the idea, that the note secured by the mortgage, is the property of the complainants.

Lastly: The bill is defective in not setting out a copy of the note, and alleging how the complainants became the proprietors of it, as well as in not offering to refund to Fenno, or those claiming under him what was due for money or property, *bona fide* advanced under his contract with Paulling.

EDWARDS, for the defendants in error. The mortgage to the complainants is of an older date than the contract between Paulling and Fenno, founded on a valuable consideration, and

was recorded before the conveyance was made by Glover to Fenno; and must prevail against the claim of the latter, which had its origin in a violation of the law. The contract which is exhibited with the deposition of Cabaniss, is not sufficiently proved as to the time of its execution; but at most it is a mere agreement to transfer a bond for titles, when certain conditions shall have been performed, which it is not pretended were performed until complainants mortgage was recorded. Aik. Dig. 209; 7 Porter's Rep. 251; 1 Story's Eq. 302; 2 Munf. Rep. 196; 4 *ibid.* 140; 16 Wend. Rep. 574.

The deed of trust in favor of Cook & Kornegay, was not executed until the complainants mortgage had been recorded; and besides, the debt it was intended to secure, is tainted with usury, so that they cannot be regarded as having acquired a lien, *bona fide*, and for a valuable consideration. Aik. Digest, 437; 1 Peters' Rep. 43, 1 McCord's Ch. Rep. 441; 6 Chranck's Rep. 252; 2 Peters' Rep. 527; 16 Wend. Rep. 575.

Lea's purchase was not made until after the complainants mortgage had been recorded, so that he is chargeable with a constructive notice, which will avoid his deed. 1 Ala. Rep. N. S. 186; 6 Wend. Rep. 203, 213; 4 Cow. Rep. 599; 1 Johns. Ch. Rep. 298, 394, 398. He can't insist that the registration of the mortgage was no notice to him, for Paulling's possession was a circumstance which should have induced him to examine the records of the County Court of Perry to ascertain whether he had, or pretended to have a claim to the land. The answer of Lea, in insisting that he is a *bona fide* purchaser without notice, is not responsive to the bill, but is affirmative of matter in avoidance, and as it is replied to, must be proved. 7 Cow. Rep. 362; 3 Atk. Rep. 314.

The jurisdiction of equity, is undoubted, and the objections made to the frame of the bill, and the right to offer testimony to disprove the answer of Fenno, are alike untenable. 1 Story's Eq. 302; 7 Porter's Rep. 251, Aik. Dig. 209. The assumption, that Paulling had no title which could be mortgaged is clearly indefensible. It is admitted that he had an interest that could be sold, and this admission proves it may be mortgaged, for a mortgage is but a conditional sale. 5 Stewart and Por. Rep. 215; 5 Porter's Rep. 452; 2 Munf. Rep. 196; 4 *ibid.* 140.

The fact, that the complainants were not parties to the gam-

ing, or did not participate in the usurious contract, rather commends them to the protection of equity. They were the first to acquire all of Paulling's rights without being answerable for any of his faults.

Fenno is not entitled to be refunded the money and value of property he parted with under his contract with Paulling. He cannot occupy a more favorable position than Paulling himself, and if Paulling had paid to Glover the balance of the purchase money due at the time he executed the mortgage to the complainants, he would not be entitled to be refunded the amount, upon a bill being filed to foreclose; for the terms of the mortgage, indicate that he had, or would obtain a clear fee-simple title. 3 Stew. and Por. Rep. 426; 4 Porter's Rep. 142. The fact that Fenno received a deed from Glover, will not prevent inquiry into the consideration of the contract between Paulling and Fenno. Aik. Dig. 209; 1 Story's Eq. 302; 10 Ves. Rep. 365; 18 *ibid* 382; 2 Munf. Rep. 194; 4 *ibid* 140; 7 Porter's Rep. 251.

COLLIER, C. J.—It was no ground of demurrer to the bill, that the promissory note which the mortgage from Paulling to the complainants was intended to secure, is not made an exhibit. The mortgage itself is exhibited, in which the note is described and this was sufficient to authorise its admission as evidence.

In respect to the omission in the bill to offer to refund to Fenno, or the persons authorised to receive it, the money paid by him to Paulling, it may be remarked, that the complainants do not admit the liability of the lands in controversy to reimburse his advances; but the bill is framed upon the hypothesis that their mortgage is not only prior in point of time, but is a lien, paramount to the claim of each of the defendants. If the complainants are not entitled to all the relief they ask, or can only obtain a decree of foreclosure and sale *sub modo*, their bill should not have been dismissed on demurrer, especially as it contains a prayer for such relief as is consistent with the case stated. It was entirely competent at the hearing, for the Chancellor to have ascertained the rights of the respective defendants, and to have directed by his decree, that the proceeds of the land subject to sale, should be applied to the payment of

the claims of the litigants, according to their legal preference. The land then being liable to the payment of the incumbrances, whether they were complainants or defendants, it was not indispensable to the complainants right to go into equity, that they should assume a personal responsibility to a defendant whose lien was superior to their's.

The allegation in the bill, that the complainants were proprietors of the note intended to be secured by Paulling, is quite sufficient. It is entirely immaterial whether they hold it under an indorsement or not, if they are entitled to the money which may be collected thereon, they were authorised to take a mortgage for its security, and may well maintain a bill for its foreclosure.

The equity of the bill, it seems to us, will not admit of serious question. It alleges the existence of a forfeited and unsatisfied mortgage to secure a debt due to the complainants; states that other persons, who are made defendants, set up claims to the premises, which it is insisted, are invalid; prays that the adverse claims may be examined, and the complainants mortgage foreclosed, &c. A mere statement of the case shows that the questions proposed to be litigated, could only be settled in chancery.

The interest acquired by Paulling, in virtue of his purchase from Glover, and payment of the greater part of the purchase money, might be transferred or mortgaged, so as to invest the mortgagee with all the right to the land that Paulling had. But one claiming by purchase from a person who had nothing more than a bond for title, will stand in the same situation as his vendor did, and will be subject to the same equities in favor of the obligor or original vendor. The want of complete titles and the possession of the bond, though its condition may not show whether full payment has been made, are enough to induce inquiry, and to prevent a divestiture of an equitable lien. We have not had access to the case of *Frazier v. Center*, 1 McC. Ch. Rep. 278, which has been cited, to show, that the complainants mortgage is invalid in consequence of the imperfectness of the title of Paulling, but we apprehend it will be found to be strictly in harmony with the law, as we have stated it.

Subject to the lien of Glover for the payment of the purchase

money due him, the complainants mortgage, if duly recorded, would be an available security, so long as Paulling retained the actual possession of the premises. Possession is a fact, which should induce one to inquire whether the possessor has title, and if he has incumbered it. It gives to one proposing to purchase, sufficient information, to enable him to examine understandingly into the state of the title; and whether the purchaser prosecutes the inquiry or not, he is chargeable with notice. Sugden on Vend. 542; Peters v. Goodrich, 3 Conn. Rep. 146; Jackson, *ex dem.* Merrick v. Post, 15 Wend. Rep. 588; Sterns v. Arden, 1 Johns. Ch. Rep. 260, Harris, *et al.* v. Carter's administrators, *et al.* 3 Stewart's Rep. 233. But whether the registration of the complainants mortgage, would operate as constructive notice to a purchaser from Fenno, after the relinquishment of possession by Paulling, is a question, by no means free from difficulty: and its solution must depend upon the construction of our registry acts. By the second section of the act of 1823, "to legalize registering and recording certain deeds of conveyances of land, in this State, and for other purposes," it is enacted, that "any deed, or conveyance of lands, tenements, or hereditaments, lying and being in this State, which shall be made and executed after the passage of this act, shall be void, and of no effect against a subsequent *bona fide* purchaser, or a mortgage for a valuable consideration, not having notice thereof, unless such deed or conveyance shall be acknowledged, or proved and certified, and lodged, within six calendar months after the time of signing, sealing and delivering the same, with the clerk of the county court in the county in which the said lands, tenements, or hereditaments are situated, to be recorded by the said clerk: *Provided, nevertheless*, that such deed or conveyance, shall as between the parties and their heirs be valid and operative." The first section of the act of 1828, "concerning the registration of deeds and patents," is as follows: "All deeds recorded within six months from the date of their execution, shall have force and be valid and operative between the parties thereto, and subsequent purchasers and creditors, and all deeds recorded after the expiration of six months, shall be valid and operative, from the date of their registration, as to creditors and subsequent purchasers: *Provi-*

ded, that the same shall be valid at all times between the contracting parties."

Although the act of 1823, declares, that any deed or conveyance of lands, &c. shall be void against a subsequent *bona fide* purchaser or mortgagee, for a valuable consideration without notice, unless the same shall be acknowledged or proved and recorded pursuant to its provisions; yet it by no means follows that the registrations of every deed shall operate as a constructive notice of its contents. The object of the registry acts was the prevention of fraud; and in advancement of that end the letter has been often made to yield to their spirit. Thus, although a deed is declared void, unless it is duly registered, it has been always held, that notice is equivalent to registration, and that a purchaser or incumbrancer with notice, cannot be permitted to allege that a deed set up against him was not recorded. Sugden's Vendors, 511, *et post*. And upon principle, it would seem that merely placing upon record, a deed from a person, not in possession, or who does not appear from the records, to have had any connection with the title himself, will not operate as a notice to a subsequent purchaser. There would be nothing to direct a purchaser to such a deed, and he could only acquire a knowledge of its contents by making a general examination of all deeds that had been registered in the office. The law certainly never contemplated that a purchaser should take upon himself such a task, the performance of which in some counties would perhaps require a year of unremitted labour. This precise question arose and was considered in *Ballou v. Murray*, 1 Johns. Ch. Rep. 566. In that case, it appears that Winter, the trustee, had sold the estate of his *cestui que trust*, Mrs. Green to Ballou (Mrs. Green herself claiming under a deed from one Heatley, for whose use, Winter had previously holden.) The deed from Winter, it was insisted, passed no title, because Ballou purchased with a notice of the trust: addressing himself to the point, the Chancellor, proceeds. "It has been said by the counsel for the plaintiffs, that Ballou was chargeable with notice of the trust, by means of the registry of the deed from Heatley to Mrs. Green, which recited the declaration of trust executed by Winter. The deed containing this recital, was registered on the 9th of April, 1810, but I cannot perceive any justice in obliging Ballou to take no-

tice of the contents of that deed. By what clew was he directed to look into the deed from Heatley to Mrs. Green? He was dealing with Winter, and supposing Winter's trust to be otherwise totally unknown to him, he might as well be required to examine the contents of every deed on record. If there had been any deed on record to which Winter was a party, he would have had a specific object and guide for inquiry; *coeca regens filo vestigia*. I have therefore not thought it reasonable to charge Ballou with a knowledge of the existing trust, by reason of the registry of Heatley's deed." The registry acts of New York, are doubtless intended to effect the same purpose as those of this State, and the difference in phraseology could not have influenced the decision of the case cited. We then consider it as a case in point, and sustained as it is by sound reasoning, yield to it the force of authority.

According to the testimony of Glover, Paulling must have ceased to occupy the land about the close of the year 1837, or the beginning of 1838, and could not, consequently, have been in possession at the time of Lea's purchase from Fenno, and at the time the latter executed the mortgage to Cook and Kornegay. This being the case, it follows from what we have said, that the registry of the complainants mortgage, was no notice of its existence, to either Lea, or Cook & Kornegay.

It is insisted for the defendants in error, that the contract between Paulling and Fenno, being founded on a gaming consideration, was void in its inception; the latter acquired no title to the land, and that those who claim under him cannot occupy a more favorable position. By the act of 1807, it is enacted that "all promises, agreements, notes, bills, bonds or other contracts, judgments, mortgages or other securities, or other conveyances whatsoever, made, signed, given, granted, drawn or entered into, or executed by any person, or persons whatsoever, after the passing of this act, where the whole, or any part of the consideration of such promise, agreement, conveyance or security, shall be for money or other valuable thing whatsoever, laid or betted at cards, dice, &c. or for reimbursing or repaying any money knowingly lent or advanced at the time or place of such play, &c. to any person or persons so gaming, &c. shall be utterly void and of no effect, to all intents and purposes whatsoever." This enactment is very similar to, and was,

doubtless suggested by a statute of Kentucky, passed in 1798; under which, several decisions, pertinent to the point we are considering have been made. In *Jones &c. v. Sevier*, 1 Litt. Rep. 50, it was held, where a person who has lost money at unlawful gaming, executes his note to a third person for the amount, and such person pays the winner an adequate consideration therefor, the note is not within the statute, and therefore valid; and a knowledge of the whole transaction by the party to whom the note was given, will not vary the case. See also *Chambers v. Thompson's administrator*, 1 Monroe's Rep. 115: So, in *Wooldridge v. Cates*, 2, J. J. Marshall's Rep. 222, a note was executed for money lost at gaming, and assigned to a person ignorant of the transaction, for a valuable consideration. The assignee afterwards surrendered the note to the obligor and took from him a new note, payable to himself within twelve months: *Held*, that the new note was binding on the obligor, and that he could not be relieved in equity, from its payment. And in *Chiles v. Coleman*, 2 Bibb's Rep. 300; it was decided, that a bond for the conveyance of land given on a gaming consideration, imposed no duty on the obligor; but if for a valuable consideration, it comes into the hands of an innocent purchaser, and the obligor conveys to him; the consideration cannot be questioned by the obligor or his heirs.

Notwithstanding the generality of the terms employed in the act cited, we have seen that a Court of Equity will not avoid every contract which has its origin in a gaming transaction, but there are cases in which relief will not be afforded against a *bona fide* assignee or purchaser, who has paid a valuable consideration. It must be conceded, as the proof would seem to show, that Fenno's contract with Paulling, by which he acquired an assignment of Glover's bond, was intended to secure to him the money he had won of Paulling, and in that view, it was void, and being so, did not transfer a right paramount to the complainants mortgage. Nor did the execution of a deed by Glover, give him a better title. The complainants lien supposing it not to have been registered, could only have been divested by a subsequent purchaser or incumbrancer, in good faith and for a valuable consideration, without notice. The question then arises, can a *bona fide* purchaser for a valuable consideration, from Fenno, assert a right against the complain-

nants. Fenno's title, we have seen, was invalid, and the registry of the complainants mortgage was no notice to one purchasing the land, after Paulling relinquished the possession, so that it must be wholly immaterial, whether that mortgage was recorded before the contract between Paulling and Fenno was made, if the former had ceased to occupy the land before Lea's purchase or Cook & Kornegay's mortgage was executed.

Upon the hypothesis that Lea and Cook & Kornegay acquired their interests in the lands in good faith and for a valuable consideration; we think it clear that they cannot be prejudiced by the invalidity of Fenno's title. Fenno was invested with a regular legal title, evidenced by the usual writings, was himself in possession, and there was no such registry of an incumbrance as was constructive notice of its existence. This being the case, one proposing to purchase, would very naturally conclude that his title was unquestionable, and that a purchaser under such circumstances, should be preferred to a secret incumbrancer. It has accordingly been holden, that a derivative purchaser without notice, cannot be affected by a notice to him under whom he claims; and if he purchase with notice, he may protect himself by the want of notice in his immediate vendor. *Lacy v. Wilson*, 4 Munf. Rep. 313; *Curtis v. Lunn*, 6 *ibid* 42; *Lindsey v. Rankin*, 4 Bibb's Rep. 482; *McNitt v. Logan*, Litt. Sel. Cases, 69; *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 147; *Cressey v. Phelps*, 2 Root's Rep. 420; *Sugden on Vendors*, 531.

Sugden says, "although a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser, viz: (would become void by a person purchasing the estate,) yet it may become good by matter, *ex post facto*, as if a man make a feoffment by covin, or without any valuable consideration, and then the first feoffor enter and make a feoffment for a valuable consideration; the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of the first feoffee, was in its creation, covinous or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last." *Sugden on Vendors*, 471.

Chancellor Kent, in *Bumpass v. Platner*, 1 Johns. Ch. Rep. 212, thus exemplifies the principle, "where A, gave a usurious

note to B, who sold it to C, for a valuable consideration, without notice of the usury, and A took up the note and gave a bond to C for the amount, it was held good." On the same principle he says, "a purchaser without notice from a fraudulent purchaser, is not affected by the fraud." See *Cuthbert v. Haley*, 8 T. Rep. 390; *Coleman v. Cocke*, 6 Rand. Rep. 618; *Sweet v. Southcote*, 2 Bro. Ch. Rep. 66; *Lowther v. Carlton*, 2 Atk. 139, 242; *Jackson v. Henry*, 10 Johns. Rep. 185; *Garland v. Rives*, 4 Rand. Rep. 282; *Hagthorp, et ux. et al. v. Hook's admr's*, 1 Gill & Johns. Rep. 270; *Durell v. Haley*, 1 Paige's Rep. 492; *Vermonet v. Delaire*, 2 Dess. Rep. 323; *Jackson v. Anderson*, 4 Wend. Rep. 474.

So it has been held, that chancery will not take the legal title from an innocent purchaser for a valuable consideration, to give it to one who has only an equitable estate. *Benzien v. Lenoir*, 1 Caro. L. Rep. 508; *Dennison v. Robbinett*, 2 H. & Johns. Rep. 55. In *Frost v. Beekman*, 1 Johns. Ch. Rep. 300, it was said to be "an established rule in equity, to give no assistance against a purchaser for a valuable consideration without notice:" see also *Wallwyn v. Lee*, 9 Ves. Rep. 24. And in *Whittick v. Kane*, 1 Paige's Rep. 202, it was adjudged that a *bona fide* purchaser without notice, who had actually paid the purchase money, could not be divested of the title to the premises, by showing, that although the deed under which his vendor claimed, was absolute on its face, yet it was intended as a mortgage. These citations will suffice to show that a purchase in *good faith and upon valuable consideration*, cannot be defeated; if the vendor had the legal title, by proof of an older title outstanding in a third person.

It was insisted by the plaintiffs in error, that it was not permissible for the complainants to adduce evidence to prove that the contract between Paulling and Fenno, was tainted with gaming; that Fenno being called on to disclose the entire transaction, his answer was conclusive, and could not be gainsayed. To sustain this argument, the act of 1812, is relied on. That statute, so far as pertinent, is as follows: "The Courts of Equity shall have jurisdiction in all cases of gambling consideration, so far as to sustain a bill for discovery; or to enjoin judgments at law." This statute does not confer upon our Courts of Chancery, the entire jurisdiction they possess, in cases of

gaming contracts; independent of legislation upon the subject, they may grant relief in such cases, upon a proper showing being made; *Lyon v. Respass*, 1 Litt. Rep. 135. But the obvious design of the act, was to increase the facilities for the loser of money, at an unlawful game, to avoid its payment. Previous to its passage, the winner could not be compelled to discover, in answer to a bill in equity, that a contract, the subject of litigation, was founded on a gaming consideration, when an affirmative response would subject him to a penalty, or a criminal prosecution: *Story's Eq. Plead.* 466, '7. To take from the winner, the right to refuse to answer, was one object of the statute. Anterior to the act, a party against whom a judgment was recovered, upon a contract, obnoxious to the law against gaming, was not entitled to go into equity, without showing some excuse for the failure to avail himself of a legal defence; to open the door of chancery, in such cases, although the opportunity of defending, at law, had been neglected, was the only additional end proposed by the statute.

The present, is not a bill for discovery, technically so called, as the plaintiffs in error have supposed; but it is a bill to foreclose a mortgage, and to adjust the superiority of the claims of the complainants and some of the defendants who set up an interest in the same property. In this view of the case, it was clearly allowable to adduce proof either to contradict or sustain the answer of *Fenno*.

It was objected, at the argument, that the answer of *Lea*, is not responsive to the bill, so far as it states a purchase by him in good faith, and on a valuable consideration, and being put in issue by a general replication, it should be supported by proof. In the stating part of their bill, the complainants say, "that they have been informed, that one *Columbus W. Lea*, claims some interest in some part of the said land. They will not allege, that the said *Columbus W. Lea* received the same on any usurious or gaming consideration; but, inasmuch as the said *Fenno's* transactions are characterised with usury and gaming, they will propose interrogatories to him in regard to the same." Further, "they state to your honor, the said *Ben. Glover*, *Wm. K. Paulling*, *George W. Fenno*, *Cook & Kornegay*, and *Columbus W. Lea*, all acted with full knowledge of your orators rights; that your orators caused their mortgage to

be recorded in the county of Perry, before any of the defendants rights attached:" upon this statement, interrogatories were proposed to Lea, as follows, "that the said Fenno and Lea may set forth their contract in regard to said lands, or any part thereof, when the same took place, the amount of money paid, or agreed to be paid by said Lea, whether any note or mortgage was executed by said Lea; the amount, date and time of payment of the same; whether part of the consideration was on any usurious or gaming consideration, and what—and that they may fully set forth every fact and circumstance in regard to the same."

It has been often held, that where an answer is responsive to the bill, and within the discovery sought, it is legal evidence in all cases. *Woodcock v. Bennet*, 1 Cow. Rep. 711; *Johnson v. Pearson*, Dev. Eq. Rep. 364; *Hagthorp v. Hook's admr's*, 1 G. & Johns. Rep. 270; *Stafford v. Bryan*, 3 Wend. Rep. 532; *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 92; *Clark v. Van Reimsdyk*, 9 Cranch's Rep. 153. The correctness of this rule is not disputed, but its application is denied as it respects the answer of Lea, because as it is said the stating part of the bill does not require him to disclose how, and upon what consideration he became the proprietor of a part of the land embraced by the complainants mortgage, although interrogatories are addressed to him calculated to elicit such a disclosure. It is well settled that the interrogating part of the bill must be founded on what precedes it, and that if there is nothing in the prior part of the bill to warrant a particular interrogatory the defendant is not compellable to answer it. But although the defendant is not bound to answer an interrogatory which does not grow out of the antecedent matter stated, or charged in the bill, yet if he does answer it, and the answer is replied to, the matter of the interrogatory is deemed to be put in issue, and the informality is cured. 1 *Smith's Chancery*, 84; *Story's Eq. Plead* 33; *Mechanic's Bank v. Levy*, 3 *Paige's Rep.* 606. The question then is, are the interrogatories proposed to Lea, warranted by the preceding part of the bill, so as to make his answer to them evidence. A variety of questions it is said may be founded on a single charge in the bill, if they are relevant to it. Thus, if there is a general charge, that money has been paid as the consideration of a contract, that general

charge will entitle the plaintiff to put all questions upon it, which are material to make out that it was paid, how, when, where, by whom, on what account, in what sums, &c. and it is not necessary to load the bill by adding to the general charge; that it was paid, all the circumstances in order to justify an interrogatory as to the circumstances. And if a bill is filed against an executor for an account of the personal estate of the testator, upon a single charge, that he has proved the will, every inquiry may be founded, which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstances leading to the account required. Story's Eq. Plead. 34 and cases there cited; *Mechanic's Bank v. Levy*, 3 Paige's Rep. 606. If the law be as we have stated it, (and it is well sustained by authority) the interrogatories proposed to Lea, were clearly authorised by the stating part of the bill, which required from him a disclosure of the nature of his claim, how, when and under what circumstances he acquired it. His answer then, so far as it alleges that he was a *bona fide* purchaser for a valuable consideration, without notice of the complainants equity, is responsive to the bill, and evidence of these facts, until disproved by overbalancing testimony. A replication, according to the English practice, does not destroy the effect of an answer as evidence, so far as it is responsive to the bill: but is intended merely to put in issue the facts stated in the answer, which are considered as irresponsible allegations.

The reservation of a greater rate of interest than eight per cent. upon the loan by Cook & Kornegay to Fenno, does not make their mortgage void as against the complainants. By the act of 1834, it is enacted, that where a higher rate of interest than *eight per cent.* shall be reserved by any contract for the loan of any money, wares, &c. the principal sum of money, or the value of the wares, &c. shall be recoverable, and the interest alone shall be forfeited.

There is then, no pretence for saying that Cook & Kornegay are not *bona fide* incumbrancers in equity, at least to the extent to which the act cited, recognizes their contract as valid. Besides, usury is an objection to a contract, personal to the party undertaking to pay it, or those who stand in his

place as his representatives. *Jackson v. Henry*, 10 Johns. Rep. 195; *Edwards v. Dick*, 4 B. & Ald. Rep. 212; *Cook & Kornegay v. Dyer*, at the present term. See *French v. Shotwell*, 20 Johns. Rep. 668.

In respect to the money and property paid by Fenno to Paulling, it is unnecessary to consider whether if the complainants were to subject the land to the payment of their demand, Fenno could recover of Paulling the amount of his advances; if he purchased without notice of the complainants lien, equity would not divest the title he had acquired, without a reimbursement of what he had paid in good faith, in order to obtain it. Fenno's claim for indemnity would not rest upon contract; but upon the broad basis of equity and moral justice. His equity would be equal to that of the complainants, and having a legal advantage, his lien for money and property actually advanced would be preferred to their's.

If however, the money paid by Lea, upon the footing of his purchase and the loan made by Cook & Kornegay, amount to a larger sum than the money, &c. advanced by Fenno, these must go in satisfaction of such advance, and extinguish his right to be paid any thing from the proceeds beyond what he has already received; leaving the rights of Lea and Cook & Kornegay to be settled according to the principles we have laid down. We have not thought it necessary particularly to consider, whether the demand of the complainants was sufficiently established, the proof to that point being entirely satisfactory to show the *indebtedness of Paulling to them*.

It results from what we have said, that the Chancellor erred in adjudging that the mortgage of the complainants was entitled to be satisfied, in preference to that of Cook & Kornegay, and that the sale to Lea, was invalid as against the complainants. But a final decree cannot be here rendered, for the want of a master's report, showing the amount of money and property paid by Fenno to Paulling, or his order, the sum lent by Cook & Kornegay to Fenno, the payments thereon, and amount now due. That this cause may be determined according to the principles of this opinion, the decree of the Court of Chancery is reversed, and the cause remanded.

KYLE v. EVANS, *et als.*

1. The issuance of an execution, is an act purely ministerial, and may therefore be delegated.
2. A justice of the peace, in the issuance of an execution, acts ministerially and not judicially, and may, therefore, delegate that power to another: and it is not necessary that such delegation should be in writing.

Error to the Circuit Court of Pike.

THE proceeding in this and forty-two other cases, which by agreement, are to abide the event of this, were motions before Jefferson Buford, a justice of the peace for Pike county, for failing to return executions received by him. The justice having rendered judgments against the constable and his sureties, they prosecuted appeals to the Circuit Court of Pike, and the parties having submitted the cause to a jury, a verdict and judgment was rendered against the constable and his sureties, from which this writ of error is prosecuted.

From a bill of exceptions it appears, that it was proven by the plaintiffs that the executions in all the cases were duly issued and delivered to the constable, as set forth in the notice, and were not returned according to law. It was admitted by the plaintiffs, that all the executions were issued by one Richard Johnson, in the name of Buford, the justice who rendered the judgments; that at the time of issuing the executions, Johnson was not an acting justice of the peace, but that Buford was, and rendered the judgments; that Buford, by parol, authorised Johnson to issue executions in all cases in which he rendered judgments, and that by virtue of that authority, these executions were issued.

The defendants, by their counsel, then moved the Court to charge the jury, that the executions having been issued by Johnson, who was not at the time an acting justice of the peace, were nullities, although Johnson was authorised to issue the same, in the name of the justice; that the justice could not delegate that authority to any other; and that the justice himself was alone authorised to issue executions. These instructions

the Court refused to give; to which refusal the defendants excepted, and now assign for error, the refusal to charge as moved for.

HOPKINS, for plaintiff in error, argued, that the executions not having been issued by the justice who rendered them, were nullities, and would not have afforded him any protection, if he had executed them, and therefore he had a right to disregard them. He also insisted that the justice of the peace could not delegate his authority to another, at least by parol. In support of these positions, he cited 10 Johns. 416; 1 Wendell, 213; 5 ib. 276, 1 Cowen, 212; 9, ib. 61; 3 Cranch, 331; 1 Peters, 340.

HARRIS, contra, maintained that the issuance of an execution was a mere ministerial act, and that an authority by parol, was sufficient. He cited Minor's Rep. 48; 2 Ala. Rep. 68; ib. 74; 4 Term Rep. 313; Story on Agency, 52.

ORMOND, J.—The amount in controversy, as well as the principle which must govern it, and the frequency of the occurrence of the question, gives to this case considerable importance.

Judicial power must be exercised by the person in whom the trust is reposed, but acts merely ministerial in their character, may be performed by deputy. It becomes necessary, therefore, to consider in what capacity a justice of the peace acts in issuing an execution. The issuance of an execution upon a judgment, is an act purely ministerial in its character, it involves no process of reasoning or deduction from other facts, but is merely the legal consequence of the judgment previously rendered; and therefore this duty is performed by the clerk, when there is one attached to the Court. A justice of the peace has no clerk, but this does not alter the character of the act: he is both judge and clerk of his own Court. *Bissell v. Edwards*, 5 Day's Rep. 368; *Huff v. Campbell*, 1 Stewart, 543. The act of the justice in the issuance of an execution, being an act purely ministerial in its character, may be delegated to another, and will be the act of the justice. Here it is shown, that Johnson, who issued the executions, was authorised by the justice to do so: it was therefore the act of the justice. In the

cases cited from 2 Ala. Reports, 68 and 74, we held that an execution from a Court of record, was regular, though issued by one who was not a deputy of the clerk, if authorised by him, and if issued by one not authorised, the adoption of it afterwards by him, would make it regular. As there is no difference in the character of the act when performed by the clerk of a Court of Record, or by a justice of the peace, the authority of these cases seem full to the point.

It is urged, that an execution must issue under the seal of the justice, and that the authority to affix a seal, must be by deed. The law referred to is, "that all warrants or *other precepts* issued by a justice of the peace, shall be under the hand and seal of such justice." Aik. Dig. 292. It has never been held that this law applied to executions, but in those cases to which it does apply, it has been considered so far as relates to the seal, directory merely, and that the want of a seal cannot be taken advantage of. Scott v. Rushman, 1 Cowen, 212.

The case cited by the counsel for the plaintiff in error, from 1 Wendell, 213, and 1 Peters, 340, merely establish the well known proposition, that where the Court has no jurisdiction to render the judgment, that its process will not protect the officer. In Toof v. Bentley & Harris, 5 Wendell, 276, the execution was made returnable in sixty, instead of ninety days, as the law required; and the Court held, that as there was no authority to issue such an execution, it would afford no protection to the officer. It is obvious that the case cited has no application to this.

The case most relied on as an authority for the plaintiff in error is, Pence v. Hubbard, 10 Johns. 416. The facts were, that a constable, in an action of trespass against him, justified under two executions issued by a justice of the peace, the dates of which had been altered by the constable after they came to his hands; the justice testifying that he might have authorized the constable to do it, as he frequently gave constables permission to alter the dates of executions. The Court held, that if the alteration in the process in that particular case, had been made by the authority of the justice, it would not be thereby invalidated, but that a general authority to a constable to fill up or alter process, would be void, and highly improper. This case then, shows that a justice of the peace may authorise an-

other to issue executions in his name; that he may direct or authorise a *constable* to do so in a particular case, but that a *general* authority to a constable to fill up or alter executions, would be improper.

The ground of this decision appears to be the impolicy of permitting the constable, the executive officer of the justice, to alter executions issued by the justice, by virtue of a general power. That such a power in the constable would be liable to great abuse, may well be conceived, but we cannot perceive that the admission of this, at all militates against the proposition here maintained, that the justice may delegate the power of issuing executions to one against whom no such objection exists; and that if such authority is proved, an execution so issued, will be as valid as if issued by the justice personally.

We are of opinion that the Court did not err in refusing the charge asked for, and its judgment is therefore affirmed.

CURRY V. BARCLAY.

1. When the condition of the writ of error bond, recites the suing out of a writ of error, and the superseding of a judgment against two defendants, and the judgment is against one only, no summary judgment can be rendered against the surety: because it, (the bond,) is not applicable to the case sent up, and could not legally supersede the judgment in the court below.

GOLDTHWAITE, J.—Since the affirmance of the judgment in this cause, it has been submitted to us, that no summary judgment ought to be allowed against the surety in the writ of error bond, because it is inapplicable to this case.

On examination, we perceive that the condition recites, that a writ of error was sued out to reverse and supersede a judgment against *James Curry and Robert Curry*. The judgment in this case was against James Curry only, and the consequence is, that the bond has no application to this suit. No judgment, therefore, can be rendered against the surety on motion.

It is to be much regretted, that proceedings of this nature should be conducted with so little care, but it is very certain; this Court can afford the plaintiff no relief. If injury has resulted from the negligence of the officer entrusted with the discretion to take a proper bond, he is doubtless responsible.

LEWEN, BY HER NEXT FRIEND, v. STONE, *et al.*

1. An execution, at the suit of S. against the husband of the complainant, having been levied on certain slaves, she filed her bill to injoin the sale, alleging, 1st. That she is entitled to a separate estate in the property, under the will of her father. 2nd. If she is not entitled to a separate estate, then, herself and son, by a former marriage, are entitled to an exclusive interest in the slaves, in virtue of the laws of Louisiana, where she was domiciled, and in possession of them, at the time of her last marriage; and, 3rd. If both the preceding grounds fail, then she claims to hold by the permission of the administrator of her first husband, and as *Dative Tutrix* of her son, appointed in Louisiana—the property never having been distributed: *Held*, that the bill was not demurrable for want of equity, want of parties, or multifariousness, that its purpose was not to put her in the enjoyment of what she supposes to be her right, but to obtain the protective power of chancery, to prevent a disturbance of her possession, and the different allegations are regarded as the assertion of so many reasons why it should be granted.

THE appellant, who is a feme covert, filed her bill in the Court of Chancery, sitting at Tuscaloosa, stating that about the third of November, in the year 1834, she intermarried with Alva Prescott, of the State of Mississippi; that after her marriage, and during coverture, her father (John Rogers) died, in the county of Copiah, in that State, having first made his last will and testament, which was duly proved and recorded in the proper Court of that county, and letters testamentary thereon, issued to Alva Prescott and Wm. T. Scott, the persons designated as executors by the testator. The will, among other bequests, contains one as follows: "I give my beloved daughter Mary Ann, wife of Alva Prescott, all the land owned by me in township ten, range seven, east, in section twenty-seven and twenty-eight, and nine, with all the appurtenances thereto."

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belonging; also, with the exception hereafter mentioned, all my stock of cattle, horses, hogs, farming utensils, waggon and team, and household furniture, &c. And also, I give my said daughter, Mary Ann, wife of the said Alva, twenty-two negroes, to wit: Alpha," &c. "The property hereby given and bequeathed to my said daughter, Mary Ann, and to her heirs alone, if any there should be, and that of her body alone, and in default, the property hereby bequeathed, is to return to my brothers and sisters, and to Alva Prescott, in equal shares."

The complainant alleges, that the slaves bequeathed to her by the will of her father, were delivered to her, to be held to her sole and separate use, and have remained in her possession without disturbance or claim from any source, until a short time previous to the exhibition of her bill. That by the bequest to her, a separate estate was created, and had been so conceded by all concerned, until the time referred to. That after receiving the possession of the slaves as aforesaid, her husband, Alva Prescott, in the year 1837, removed into the Parish of Caddo, in the State of Louisiana, where the complainant, with the slaves in her possession as aforesaid, resided with him up to the period of his death, which took place nine or ten months after his removal. At the time of the death of her then husband, the complainant was the mother of a son, the issue of her marriage, named John Thomas, (who is still living with her, aged about five years) of whose person and estate, she was duly appointed "dative tutrix," by the proper Court of the Parish of Caddo." *And further*, administration of the estate of Alva Prescott, was granted to one Robert V. Marye, of that Parish, who has not made final settlement thereof.

The complainant also alleges, that in August, 1838, in the Parish of Caddo aforesaid, she intermarried with Charles W. Lewen, one of the defendants, and in February, 1839, removed with him to the county of Tuskaloosa, where they now reside; bringing with her, in her separate possession and enjoyment, the slaves in question. That a few days previous to the exhibition of this bill, the sheriff of Tuskaloosa county levied an execution which issued from the Court of Chancery in favor of Wm. D. Stone, against Charles W. Lewen, on some of the slaves and their increase, bequeathed to the complainant as

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aforesaid, and who are described as follows: "Clint, or Clinton," &c.

It was alleged that the liability on which the decree in favor of Stone was rendered, originated long before the defendant Lewen intermarried with the complainant; notwithstanding which, the said Stone, with a full knowledge of the complainant's claim to the slaves, (as she believes,) is desirous of subjecting them to the satisfaction of his execution.

The complainant then insists that the slaves in question are not liable to the payment of the execution for the following reasons: 1. By the will of her father, they are bequeathed to her sole and separate use, and the ordinary marital rights do not attach to property thus circumstanced. 2. If the form of the bequest does not create a separate estate to her use, then, the right to the slaves vested in her former husband, whose estate has not been settled, but remains in Robert V. Marye as the administrator thereof, subject when settled, to be distributed to the complainant and her son.

It is further stated, that by the laws of Louisiana, no interest whatever in the property of the wife, passes to the husband in virtue of the marriage; and if the complainant had no separate estate in the slaves, then her possession was only as a trustee for Marye, the administrator.

The bill, after setting out the other usual formal parts, prays process of *subpœna* for Charles W. Lewen and Wm. D. Stone, and that they may answer; prays an injunction as to farther proceedings on Stone's execution against the slaves, and concludes as follows: "The premises considered, may it please your Honor to decree, that said Wm. D. Stone and his confederates, and all others concerned herein, be perpetually enjoined from intermeddling with, or any way disturbing the possession and enjoyment of the aforesaid slaves of your oratrix; and if your oratrix has mistaken the relief proper to be granted her in the premises, your oratrix prays your Honor to grant her such other and further relief in the premises, as to your Honor may seem right and proper, according to the rules of equity, and the course of this Court," &c.

An injunction was awarded in conformity to the prayer of the bill. The defendant, Lewen, answered the bill, admitting its allegations and inferences, disclaiming all right to the slaves

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bequeathed to his wife by her father, and consenting, that if necessary, the same may be settled to her sole and separate use. The defendant, Stone, demurred to the bill, assigning as causes of demurrer, that it is multifarious, repugnant, contains a misjoinder of causes of complaint, and does not disclose a sufficient ground for equitable relief.

The cause came on to be heard on the demurrer, and the Chancellor being of opinion that the bill was multifarious, dismissed it without costs and without prejudice. To revise that decree, the complainant appealed to this Court.

COCHRAN, with whom was CRABB, for the appellant, insisted;

1. A bill may be predicated upon several claims to the same property; some claiming the absolute interest; others the right of possession. Story's Eq. Plead. 233, § 284; Varick v. Smith, 5 Paige Rep. 160.

2. There are sufficient parties before the Court. The object of the bill is not to affect the title as to Marye; he was not an indispensable party, and being out of the jurisdiction of the Court, might well be omitted. Story's Eq. Plead, 79, § 78-80; Gayle, *et al.* v. Singleton, 1 Stew't Rep. 566.

3. The right of possession is sufficient to maintain a bill for an injunction. 2 Story's Eq. § 882, 912, 914, 928, 929, 956.

4. If a bill professes to state several grounds for relief, some of which are good, and others not, the Court will entertain the bill, but disregard the objectionable parts. Story's Eq. Plead. 232, § 238; Varick v. Smith, 5 Paige's Rep. 160; Gayle v. Singleton, 1 Stew't Rep. 566.

PECK and CLARK, for the appellee, Stone. A bill that alleges title in the alternative, is bad on demurrer. Story's Eq. Plead. 392; 3 *ibid.* 208-9, § 244-5. When a bill is filed with a double aspect, the grounds of relief must be consistent with each other. 212-13, § 254.

If the complainant claims as a distributee, and distribution be made after removal to Alabama, then the marital rights of the husband will attach. This shows, that in this view of the case, the complainant has no interest whatever, except the right of survivorship, if her husband dies before distribution is made.

It was said by Lord Eldon, that where there is no marriage contract, the law of the actual domicile will govern, as to all pro-

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erty, without distinction, whether acquired before or after a change of domicil. *Lashley v. Hogg*, cited in Robertson's Appeal Cases, 4. See Story's Conf. Laws, 150; *Decouche v. Savetier*, 3 Johns. Ch. Rep. 210-14-15.

Where property is conveyed to a trustee, in trust for the sole and separate use of a married woman, and she survives her husband and marries again, she no longer holds the property to her separate use, but her whole interest, if it be personal property, vests in her second husband. *Miller v. Bingham, et al. ex'r.*, 1 Iredell's Eq. Rep. 423; *Knight v. Knight*, 9 Cond. Ch. Rep. 199; *Benson v. Benson*, *ibid.* 201.

COLLIER, C. J.—If the defendant, Lewen, had not a legal interest in the slaves in controversy, then they were not subject to levy and sale, under the execution of Stone. That execution though issued from the Court of Chancery, we infer, is founded on a monied decree, which does not specifically direct the slaves to be sold in order to its payment; consequently, if the title to them had not vested in Lewen, they could not be regularly reached by execution. Supposing such to have been the condition of the property, it was competent for the person having the legal title to have interposed a claim, and tried the right as provided by the statute; and if that person was absent from the country, or legally incapable of litigating the right under the statute, then a Court of Equity, *ex necessitate*, or to prevent great or irreparable injury, would interpose by way of injunction, at the instance of a party, showing a sufficient interest in the subject.

The object of the complainant's bill, is professedly to arrest all further proceedings upon the execution of Stone, and to discharge the slaves from its levy; and the ground of equity alleged is, that Lewen, as husband, never acquired the possession of the slaves; because they were bequeathed by the complainants father, to her sole and separate use. If, by the bequest in the will of her father, a separate estate was not created, then she and her child by a former marriage, are entitled to the entire property in the slaves, and the laws of Louisiana, where her last marriage took place, does not entitle her present husband to any part of her estate. And further, the estate of her first husband has not been settled by the administrator appointed in

Louisiana, and she was duly appointed in that State "*Dative Tutrix*" of her son; upon this latter ground, if the former fail, she claims to hold the slaves.

These allegations seem to us to be entirely consistent with each other, and can only be regarded as so many distinct reasons why an injunction should be awarded. The bequest in the will of John Rogers, deceased, is first relied on, as giving the complainant a separate estate; if that shall not thus operate, then she insists that the slaves were the property of her first husband, and never having been distributed, have not vested in her present husband; and if the laws of Louisiana are applicable, no property could vest in him, her estate and domicile being there, and her marriage there consummated. The grounds stated, as entitling the complainant to relief, may affect her rights differently; under one, she would be the exclusive proprietor of the slaves, while under the other, she would be entitled to them conjointly with her son, after the estate of her former husband was settled; but we cannot think, that for this reason, the bill is multifarious, or that there is a misjoinder of causes of complaint. In the causes stated, the complainant and the defendant, Stone, are both interested, for if either be available, it will be shown, that the interest of the former had never vested in her husband, *jure mariti*, and consequently, that the execution of Stone could not be satisfied by the sale of the slaves.

If the bill be multifarious, it must be upon the ground, that it unites several distinct matters, perfectly unconnected against the defendant, Stone. If this were an original bill, seeking to set up an estate in the complainant, founded upon all the sources stated, the objection might be available; but such is not its character. It is not an original bill to put her in the enjoyment of what she supposes to be her right, but it is an appeal to the preventive power of chancery, to protect her possession, asserting several reasons to show why it should not be disturbed. If the complainant's interest be such as she supposes, it is clearly competent for equity to afford her relief. In the first case, if the will of her father gave a separate estate, it is clear that the property cannot be sold to pay her husband's debts: in the second, as the marital rights of the husband have not attached upon the slaves, a Court of Chancery will enjoin him;

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or his assignee from taking possession of them, and *a fortiori*, his judgment creditor, from selling them under execution, until a suitable settlement shall be made upon her. *Dunn and wife, et al v. The Bank of Mobile, et al.* 2 Ala. Rep. N. S. 152; 2 Story's Eq. 630, '33, '35, 641; *Roper on Husband and Wife*, 250; *Atherley on Mar. Sett.* 350.

If has been frequently remarked, that it is difficult, if not impossible to educe from the authorities any rule of universal application, or as an abstract proposition, to say what constitutes multifariousness. The courts do not favor the objection, where its allowance does not appear to be promotive of justice, and consequently, are very much disinclined to extend the principle on which the cases heretofore occurring have been decided. A familiar, and perhaps the most usual case of multifariousness, is where a defendant has no connexion whatever with a large portion of the record, and the case made by it. But if the view we have taken of the complainant's right to go into equity, be well founded, it is perfectly clear that the case stated in the bill in every aspect, concerns the defendant, Stone.

Again: it has been said, if a bill does not pray for multifarious relief, it cannot be demurred to for multifariousness, though the case would support a prayer for such relief: *Dick v. Dick*, 1 Hogan Rep. 290. In the present case, the prayer is for an injunction to prevent any disturbance of the complainant's possession and enjoyment of the slaves by Stone, and if such be not the redress to which she is entitled, she then asks for such relief as may be appropriate. This is not a multifarious but an alternative prayer, and if the case cited may be regarded as an authority, the bill is free from the objection alleged.

If the administrator of Prescott, and the infant son of intestate, were made parties, and a prayer added for the settlement of the intestates estate, &c. we will not say that the bill would be multifarious in introducing into the record, matters independent of, and distinct from the case of the complainant and the defendant, Stone; but certain it is, that if thus changed, it would be more liable to the objection, than it now is. And if it be necessary to modify the bill, in order to entertain it, the Court would not, immediately upon its being amended repudiate it for multifariousness; this would be in effect, to declare, that although the case stated, was *prima facie* a good one, yet

Chancery was too much trammelled in its mode of procedure, to adjudicate it; a principle which that Court cannot recognize. To such a state of things, the remarks of Lord Cottenham, in *Mare v. Malachy*, 1 Mylne & Craig's Rep. 559, are strikingly appropriate. It is the duty, says he, of every Court of Equity to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases, which from the progress daily making in the affairs of men, must continually arise; and not from too strict an adherence to forms and rules established under very different circumstances, to decline to administer justice, and to enforce rights, for which there is no other remedy.

The *onus* of sustaining the allegations of the complainant's bill, rests upon her, if a negative answer is interposed, and if she shall establish either of the grounds on which she places her title to relief, the injunction must be continued. If under the will of her father, it shall be determined that she is entitled to a separate estate, or the laws of Louisiana, invest herself and her son with a joint but exclusive interest, then the defendant, Stone, cannot pursue the property further; but if neither of these grounds shall be sustained, and it shall appear that the estate of Prescott has not been settled, he may go into equity and coerce a settlement, and distribution of the estate, subject however to the payment of the debts of the intestate and a suitable provision for the complainant.

As this cause was disposed of by the Court of Chancery upon a question of pleading, we have forbore to consider the merits of the case, thinking it best, that it should be left open to examination, when brought to a hearing. We have only to add, that the decree is reversed, and the cause remanded.

PICKARD, *et als.* v. PETERS, USE, &c.

1. When the sheriff demands a bond of indemnity from the plaintiff in execution, which is not given, he may deliver the property levied on to the person from whose possession it was taken, but if he does not do so, but retains it, the lien continues.
2. Where, upon the refusal of the plaintiff in the senior execution to indemnify the sheriff, on his demand, the plaintiff in a junior execution gives the necessary bond, the levy of the senior execution is discharged, and the lien transferred to the younger execution.
3. Property levied on may be sold after the return day of the execution, by the consent of the defendant, without a *venditioni exponas*.
4. Upon a motion to the Court to direct the application of money in the hands of the sheriff, if there is no controversy about the facts, there is no necessity for impannelling a jury.

Error to the Circuit Court of Tallapoosa.

THIS appears to have been a motion in the Court below, to direct the coroner, (there being no sheriff) in the application of money, in a contest between the parties to two executions which were in his hands at the time the money was made, which was not sufficient to satisfy both. The motion, which the coroner acknowledged to have notice of, was in these words:

John H. Peters, use, &c. v. M. M. Cravens, James Young, M. T. Ellis and H. C. Townes.

In this case, the plaintiff moves the Court for an order on the coronor, H. J. Pickard, to pay over to the plaintiff the amount of money levied under the plaintiff's execution, the plaintiff having a superior lien to others on which the coroner, seeks to appropriate the funds. I acknowledge due service of this motion.

H. J. PICKARD.

The facts set forth in a bill of exceptions were, that the coroner had two executions against the same defendants, in favor of different plaintiffs, both of which were levied on a negro girl with other property; that of the defendant in error having been first received by him. It also appeared that after the levy, the coroner required from the defendant in error, a bond of indemnity to sell the slave, which was refused.

On the 5th October, 1841, after the return day of the *fiery facias*, by "agreement, between the defendant in the execution and the coroner, the slave was sold at auction without a bond of indemnity, and the money applied to the younger execution, neither levy having been discharged." The coroner on the day of the sale indorsed on the younger execution, "satisfied in full by sale of slave Maria."

Under this state of facts, the Court decided that the money for which the negro sold, should be applied to the elder execution, and that the coroner was liable to the plaintiff for the same, on this motion, after which decision, he endorsed on the junior execution "appropriated this money by order of Court, to an older execution in favor of John H. Peters, use," &c. The defendant excepted to the opinion of the Court.

A judgment was afterwards entered up against the coroner and his sureties on his official bond in favor of the plaintiff in the senior execution for the amount for which the slave sold.

From this judgment the coroner and his sureties prosecute this writ of error, and now assign for error:

1. The matter contained in the bill of exceptions.
2. That no notice was given to the parties below.
3. That the case was decided without the intervention of a jury.

HEYDENFELDT, for the plaintiff in error.

BAYLOR, contra.

ORMOND, J.—If there was any assignment of error bringing to our notice the judgment of the Court against the coroner and his *sureties*, there can be no doubt that the judgment there rendered would have to be reversed, as no notice appears to have been given to the coroner, which would authorise a judgment against his sureties. It is, to be sure, assigned for error that notice was given to the parties below, but it is not necessary that notice should be given to the sureties, as has been repeatedly held in this Court; if the sheriff has been duly notified that a motion will be made against him and his sureties, it will be sufficient, according to the express directions of the statute.

Here, the coroner was notified that a motion would be made against him, not under the statute for failing to pay over the

money, which he appears to have been perfectly willing to pay, provided he could do it with safety, but addressed to the extraordinary power of the Court in the supervision of the conduct of its own officer. In such a proceeding, the sheriff is a mere stake holder, the true parties litigant, are the plaintiffs in the rival executions. It is therefore most obvious, that a notice of a motion of this character, will not authorize a judgment against the sheriff and his sureties, and although a judgment by mistake, or for some reason which does not appear, was finally rendered against the coroner and his sureties, *they were not the parties below.*

We come now to consider the judgment of the Court on the facts, which was doubtless what was intended to be presented for revision in this Court. The first question is, whether the refusal of the plaintiff in the senior execution to give a bond of indemnity, on the demand of the coroner, discharged the levy, or precluded the plaintiff from afterwards insisting on the money arising from a sale of the slave.

The sheriff has the right, where a doubt arises, whether, after a levy, the right of the property is in the defendant in execution, to demand from the plaintiff in execution, a bond of indemnity, to protect him in the sale of the property. If this bond is not given, the sheriff is justified in delivering the property to him from whose possession it was taken. Aik. Digest 167, § 43. A subsequent act, declares, that in such a case, where there is a senior and junior execution, that if the plaintiff in the former, refuse to execute the bond and the plaintiff in the latter consent to do so, the lien shall be divested in favor of the junior execution. Aik. Dig. 166 § sec. 39.

In this case, it appears that a bond was demanded by the coroner, of the defendant in error, and refused, but the coroner did not, as he then had the right to do, return the property to the person from whose possession he had taken it; nor did he demand from the plaintiff in the junior execution, a bond to indemnify, but as we must presume, retained both executions and the property in his hands, until after the return day; as it is stated, that neither levy had been discharged. As therefore, no action followed his demand of a bond of indemnity from the defendant in error, it cannot, that we can perceive, have any influence in this cause. If the coroner had, upon the refusal of

the defendant in error to give the bond, returned the property, that would have discharged the levy, or if the plaintiff in the junior execution had, upon the refusal of the defendant in error indemnified the sheriff that would have transferred the lien to the younger execution; neither having been done, the lien of the elder execution is perfect.

The question, whether property levied on can be sold after the return day of the execution, without a *venditioni exponas*, does not arise in this case. The question presented on the record, is not whether the property was legally sold, as it is shewn that the sale was by the consent of the defendant in execution without a bond of indemnity. It is not, to be sure, explicitly stated that the coroner made the sale in virtue of the levy, but that such was the fact, is quite clear from the statement that no bond of indemnity was required, and it is certain that the execution was not returned. If the sale had been made by the consent of the defendant in execution, without reference to either levy, there would have been no propriety or necessity of adverting to the fact that a bond of indemnity was not required.

This being then merely the case of a sale under a levy there being a prior lien by virtue of a previous levy, the judgment of the Court below, enforcing the lien of the senior execution was strictly correct.

It is no objection that the facts were not passed on by a jury. The question submitted to the Court, was not one of fact, but of law; it was not what acts were done by the coroner, but the legal consequences attending these acts.

Let the judgment be affirmed.

THE STATE v. SIMMONS.

1 To support an indictment for putting out an eye of an individual, under the statute of mayhem, it is not necessary where the injury is done in a sudden conflict, that the defendant should have formed the design previous to the conflict; it is sufficient if the defendant maliciously and on purpose does the act in pursuance of a design formed during the conflict.

Question reserved by the Circuit Court of Macon county.

THE defendant was indicted for mayhem, in putting out the eye of one Boyd, on purpose and of malice aforethought.

At the trial, it appeared in evidence, that the eye of the prosecutor was gouged out in a sudden conflict. The defendant requested the Court to charge the jury, that in order to constitute the offence charged, it was necessary, not only that the injury should be done with malice, but also, that the defendant should have formed a premeditated design to commit the mayhem previously to the conflict. This charge the Court refused to give, and instructed the jury, that if the defendant maliciously, and on purpose, during the conflict, formed the design of maiming the prosecutor, and in pursuance of the design as formed, did commit the mayhem as charged, then the offence was complete.

The defendant was convicted, but the Court considering the questions of law arising out of the charge as novel and difficult reserved them for the decision of the Supreme Court.

The cause was submitted by the ATTORNEY GENERAL, without argument.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—A very brief examination of the statute under which the prosecution was had, will suffice to show the entire correctness of the Circuit Court, in refusing the charge requested, as well as in giving the one on which the case was decided.

The statute declares, that if any person or persons, on pur-

pose and of malice aforethought, shall unlawfully cut or bite off the ear or ears; or cut out or disable the tongue; put out an eye while fighting or otherwise; slit the nose or lip; cut or bite off the nose or lip; or cut off or disable any limb or member, of any person whatsoever, such person shall be deemed guilty of mayhem. Aik. Dig. 102, § 5.

This enactment is so clear and precise as to carry its own commentary with it. The act from which injury ensues, must be intended or purposely done, as contradistinguished from an accident, and it must also be done with malice aforethought, by which a malicious design to injure, is evidently meant. It is entirely immaterial, at what period of time this malicious design is formed; if it exist, and the injury is consummated, the offender is clearly within the letter, as well the spirit of the law.

The charge of the Court is entirely conformable to this view, and the judgment is therefore affirmed.

CALHOUN, BY HER NEXT FRIEND, V. COZENS, *et al.*

1. The complainant alleged, that she was to hold certain slaves, which she claimed under a deed of gift, agreeably to a statute of Mississippi, for the protection of the property of married women. The terms of the act were not more particularly recited, but it was alleged that the slaves were given by the deed, to be held by the complainant to her separate use, benefit, &c. during life, and to the heirs of her body thereafter—*Held*, that the bill was not demurrable for the omission to state the provisions of the statute referred to, the more especially as the interest set up by complainant was alleged to be an estate to her separate use.
2. Where the separate estate of the wife is levied on to pay a debt of the husband, in default of any other remedy, a sale may be stayed by injunction.
3. Where a bill for an injunction is not regularly verified by affidavit, and its allegations are denied upon information and belief only, the injunction should not be unconditionally dissolved for the insufficient verification, but the Chancellor should direct that the complainant, or some one acquainted with the facts, should verify the bill in a reasonable time, and in default thereof, the dissolution be absolute.
4. Where the allegations of the bill for an injunction are positive, but the answer is a mere denial of them, upon information or belief, the answer does not warrant the dissolution of the injunction.

This cause comes here by appeal, from the Chancery Court sitting at Tuscaloosa.

THE appellant describing herself as the wife of Ewing F. Calhoun, filed her bill by her next friend, Alexander J. Calhoun, in which she sets forth, that on the 23d of June, 1840, in the county of Rutherford, in the State of North Carolina, Henry McAden, of the county of Caswell, in the same State, in consideration of love and affection, and the sum of five dollars, paid him by her, did give, grant and sell her, the following negro slaves, for life, viz: Jane, a woman about twenty-four years of age, (since which time she has been delivered of two female children) Phillip, Jack and Toney, each aged about twenty-four years. Which slaves the complainant alleges, she was to hold together with their increase, agreeably to a statute of Mississippi, (where she resided) passed for the protection of property, of which married women might become seized or possessed, whether by direct bequest, demise, gift, purchase or distribution, in their own name, and as of their own property: The complainant refers to, and makes part of her bill, the deed of gift of the slaves made by McAden, in which it appears that they are to be holden as aforesaid, during her life, "and at her death, to be equally divided between the heirs of her body."

It is further stated, that while the said slaves were in the possession of the complainant's agent, Simon Cockerel, who was removing them from North Carolina to her residence in Mississippi, an attachment at the suit of Jacob B. Cozens, returnable to the Circuit Court of Tuscaloosa county, in the State of Alabama, was on the sixth day of August, 1840, levied upon them by the sheriff of that county; that on the twenty-fourth of March, 1841, a judgment was rendered in that suit, against Ewing F. Calhoun, the defendant therein, for the sum of two thousand, four hundred and fifteen dollars and seventy-five cents, besides costs. The complainant alleges, that she tendered to the sheriff levying on said slaves, an affidavit of her right to the property, and a bond with surety, for the purpose of obtaining a trial of the right, but he refused to receive or recognize her claim, upon the ground that she was a *feme covert*.

The bill proceeds to state, that an execution has been issued against the property of Ewing F. Calhoun, upon the judgment

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rendered as aforesaid, and levied by the sheriff of Tuskaloosa, on the said slaves, all whom are advertised for sale on the first Monday in July, being the fifth day of that month. That they "were at the time of levying the attachment and execution, the *bona fide* property of your oratrix, and were given and granted to her by the said Henry McAden, to be held by her, to be used, enjoyed and possessed, for and during her natural life, for her own proper use, benefit and behoof, separately and exclusively, and at her death, to be equally divided between the heirs of her body begotten."

The complainant alleges the insolvency of her husband—her repeated solicitations to Cozens to desist from all proceedings against the slaves, with a view to their sale; and the expenditure of a large sum of money, in order to protect her interest.

The bill prays that *subpœnas* may issue to the defendants, Ewing F. Calhoun, Jacob B. Cozens and Wm. Braly, the sheriff of Tuskaloosa, and that an injunction may be awarded to restrain the sale of the slaves. An injunction was accordingly granted on the 30th June, 1841.

At the foot of the bill, is an affidavit, as follows: "The State of Alabama, Tuskaloosa county. Personally appeared before me, E. M. Burton, an acting justice of the peace, in and for the county aforesaid, Alexander J. Calhoun, who being duly sworn, deposes, and on his oath doth say, that the facts as they stand, stated in the foregoing bill, so far as they depend on his own knowledge, are true, and so far as they are derived from the knowledge of others, he believes to be true. Sworn to and subscribed before me, this the 30th day of June, one thousand eight hundred and forty one. ALEX. J. CALHOUN."

E. M. BURTON, justice of the peace.

The defendants, Cozens and Braly, only have answered.—The former admits the proceedings on attachment at his suit, against Ewing F. Calhoun, the recovery of a judgment, the issuance and levy of an execution on the slaves, and an advertisement of their sale, substantially as alleged in the bill. But he denies, upon *information and belief*, that the slaves in dispute, are the property of the complainant, that there is any relationship, or even acquaintance, existing between Henry McAden and herself—asserts upon *information and belief*, that the slaves are, and were at the time the deed exhibited with the bill

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was executed, the property of her husband, and that the deed from McAden was a mere device of Ewing F. to defraud his creditors, and to secure the property to his wife and children. Admits that Ewing F. has not the visible means to pay his debts—knows nothing of the amount of complainant's expenditures, in resisting a sale of the slaves; denies that the complainant, or any one representing himself as her agent, ever applied to him to cease his efforts to subject them to the payment of his judgment. The answer sets forth other matters, which as they are not noticed by the Court, need not be here stated.

The answer of Braly admits the levy of the attachment on the slaves, the offer of the complainant to make affidavit and execute a bond, with surety, in order to try the right of property, and his refusal to give up the negroes to her, in consideration of such a step being taken by her, on the ground that she was a feme covert. He avers that his refusal to admit the claim of property, was afterwards approved by the Court, to which the attachment was returned; that all his acts in regard to the slaves, were done under lawful authority, in virtue of his office, and not with an intention to vex or harrass the complainant, and prays that his answer may be regarded as a demurrer to the bill.

At the first term after the filing of the bill, the defendants, Cozens and Braly, moved to dismiss the same as to Braly, and to dissolve the injunction upon the answer of the former, and for the insufficiency of the affidavit accompanying the bill. The chancellor dissolved the injunction upon the ground, that the affidavit did not sufficiently verify the bill, and dismissed the same as to Braly.

PECK and CLARK, for the appellants.

WM. B. MARTIN, for the appellee.

COLLIER, C. J.—It is insisted that the bill is defective in not reciting the provisions of the statute of Mississippi, referred to in the deed from McAden to the complainant. The bill would certainly have been more technically accurate in the statement of the case, if it had been thus framed, but the want of technicality in this respect, is not a fatal objection; for the omission to recite the act, is cured by the allegation, that the slaves in question were *bona fide* the property of the complai-

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nant, at the time the defendant's attachment was levied upon them—were given to her by “Henry McAden, to be held by her, to be used, enjoyed and possessed for, and during her natural life, for her own proper use, benefit and behoof, separately and exclusively, and at her death, to be equally divided between the heirs of her body begotten.” This statement sufficiently indicates that the estate of the complainant in the slaves, was separate from, and exclusive of the control of her husband, and all other persons during her life, and may be regarded as explanatory of the effect of the statute of Mississippi, upon the deed of gift, under which she claims.

The equity of the bill consists in this, the separate property of the wife has been levied on, by legal process, and is about to be sold to pay the debts of the husband, and the only means by which such a result may be prevented, is an injunction to restrain the sale. The mere statement of the gravamen of the complaint, shows, that the case is one which chancery should entertain.

In respect to the verification of the bill, the eighth section of the act of 1823, “to regulate proceedings in chancery suits,” (Aik. Dig. 288,) enacts that “all answers and bills for injunction, and writs of *no exeat*, shall be sworn to, before any clerk of a Circuit Court, Judge, or Justice of the Peace.” It is not objected, that the bill is sworn to by the next friend of the complainant, but it is insisted that the affidavit does not affirm the truth of a single fact put in issue; while the allegations of the bill are made by the complainant, the affidavit merely declares that they are true, so far as they depend on the knowledge of the next friend, and a belief of their truth, so far as they are derived from the knowledge of others. Such, indeed, is the frame of the bill, and the manner of its verification. It must be admitted that the affidavit is an unusual one; it may be literally true, without sustaining, to any extent, the truth of the bill; for it does not declare that the next friend possessed a knowledge of the facts, or was informed of them by others who possessed such knowledge. But although the affidavit is thus defective, we cannot think that the injunction should, for that cause, have been unconditionally dissolved. The correct practice, it seems to us, in a case like the present, where the answer denies the statements of the bill, upon information and be-

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lief, is to call upon the complainant, or some one acquainted with the facts, to verify them, and in default of a proper affidavit, after some reasonable time to be prescribed, then direct that the injunction be dissolved. True, the law does not prescribe the form of the *jurat* to a bill for an injunction, but the statute evidently contemplates such as is affirmative of the truth of its allegations, either upon knowledge, information or belief.

The injunction having been irregularly dissolved for the insufficiency of the affidavit, we must refer to the answer of the defendant, Cozens, to ascertain if it is such a denial of the equity of the bill, as authorised the order of dissolution. Upon a motion to dissolve an injunction, the Chancellor confines himself exclusively to the combination of facts set forth in the bill, out of which the equity of the case arises, and to the answer of the defendant to those facts. *C. and Ohio Canal Company v. B. and Ohio Rail Road Company*, 4 G. & Johns. Rep. 7. In *Ward v. Bokkelen*, 1 Paige's Rep. 100, it was held that an injunction will not be dissolved upon the answer of the defendant, unless it positively deny all the equity of the bill; and that a denial from information and belief, is not sufficient. *Rodgers v. Rodgers*, 1 Paige's Rep. 426; *Apthorpe v. Comstock*, Hopkin's Rep. 148; *Roberts v. Anderson*, 2 Johns. Ch. Rep. 204; *Williams v. Hall*, 1 Bland's Rep. 194. But in *McFarland v. McDowell*, 1 Caro. L. Repo. 110, it was considered, that an answer will be sufficient to dissolve an injunction, if it set forth circumstances disproving the allegations of the bill, although it do not positively deny them.

The answer of Cozens does not undertake to negative, with positiveness, the truth of the facts on which the injunction was awarded, but merely states circumstances upon information and belief, and declares that he is informed and believes the material allegations of the bill are untrue. Now, although the answer is special in its terms, yet, according to the authorities cited, it does not warrant the dissolution of the injunction.

Brady, as he had no interest in the controversy, and is not charged with a breach of official duty, and appears to have acted strictly in conformity to law, was an unnecessary party.—The dismissal of the bill as to him, was, therefore, proper, and the decree is thus far affirmed; but in other respects, it is reversed, and the cause remanded.

WILLIAMSON & DANIEL V. THE BRANCH BANK AT MONTGOMERY.

1. Under the act of 1841, "the more effectually to enforce the performance of the duties of sheriffs," it is not necessary, in a motion against the sureties of the sheriff, to show that the sheriff has been notified of the intended motion.
2. A judgment is never arrested for extrinsic matter, not appearing on the record itself.

Error to the County Court of Montgomery.

THIS was a judgment rendered on motion against the plaintiffs in error, as the sureties of J. M. Hill, sheriff of Wilcox county.

The judgment entry recites, that on the 3d November, 1841, the Bank, by its attorney, moved the Court for judgment against the plaintiffs in error as sureties for J. M. Hill, late sheriff, &c. for his failure to pay over the amount of an execution which is particularly described; and it appearing to the satisfaction of the Court, that the defendants have had one day's notice of this motion, thereupon came a jury, &c.

The record further recites that the jury find that the execution came to the sheriff's hands on a day which is named; that on a subsequent day, and while sheriff, he received a certain sum thereon, at which time the defendants were his sureties; that the Bank, by its agent, on the 4th November, 1841, demanded of Hill, the money so made by him on the execution, and that he refused to pay it over, and from the fact so found, the Court rendered judgment against the plaintiffs in error, for the amount received by the sheriff, with ten dollars for the detention of the money for nineteen days, and the costs of the motion.

At a succeeding day of the term, the plaintiffs in error moved in arrest of the judgment:

1. On the ground that the sheriff is not named in the notice.
2. That no notice has been given to the sheriff of Wilcox county.
3. Because the record does not shew that the plaintiff has

complied with all the requisites necessary to render the defendants liable.

The Court overruled the motion, but at the instance of the defendants counsel sealed a bill of exceptions, from which it appears that the counsel for the defendants below applied, on the trial of the motion in arrest of judgment, for the notice which had been served on the defendants, to be laid before the Court in order to lay a ground for arresting the judgment, by showing its irregularity or insufficiency, which was opposed by the counsel for the Bank, and sustained by the Court, on the ground that the objection should have been taken on the trial of the motion, and came too late after judgment, to which the defendant by his counsel, excepted; and now prosecutes this writ of error.

The assignments of error are,

1. The Court erred in overruling the motion in arrest of judgment.

2. It does not appear that any notice was issued to Hill, late sheriff of Wilcox, or that any notice was executed on him.

3. The record does not shew that the money was demanded of Hill before the notice issued.

4. The record does not shew that there was any notice shewing who was the sheriff of Wilcox at the time the money was received.

5. It does not appear that the plaintiff had notice, under which act of the Legislature for failing to pay over money, the plaintiff below intended to proceed.

6. The record does not shew that the plaintiff below would proceed for damages, as well as the amount collected, and interest.

7. The record does not shew that the plaintiff below complied with all the requisites necessary to render defendants liable.

8. The Court erred as shewn by the bill of exceptions.

WILLIAMS & SAFFOLD, for plaintiffs in error—cited, 1 Ala. Rep. N. S. 262; 6 Porter, 64; 5 ib. 545; Aik. Dig. 164, 174; 2 Stew. and Porter, 109; 8 Porter, 101, 372.

ELMORE, contra—cited, 1 Stewart 442; 8 Porter 99, 372; 1

Ala. Rep. N. S. 543; 2 ib. 164; Pamphlet Acts, 9 January, 1841, to be found in Meek's Dig. 346.

ORMOND, J.—It has been repeatedly held, that in cases of this summary character, the notice is no part of the record, unless made so, by reference to it in the judgment of the Court, or embodied in the record by bill of exceptions. The notice, when produced to the Court, is evidence merely, and all that is necessary, is that the judgment should show that such evidence was produced. That this is the law, is conclusively shewn, by the cases cited by the defendants counsel. This is a sufficient answer to all the assignments of error which question the sufficiency of the notice.

It is however objected, that the record does not show that notice was served on the sheriff, or that a notice issued to him. The act of 9th January, 1841, in substance declares, that when a notice shall issue against any sheriff and his sureties in office, judgment shall be recovered of such of the parties as have been served with notice. Previous to the passage of this law, no judgment could be obtained against a surety, by motion in this class of cases until the principal was notified. *Orr v. Duval*, 1 Ala. Rep. 262. This act has changed the law, so as to authorise a judgment against "such of the parties as service is effected on." There was then no necessity to give the sheriff notice, and even if it were conceded that since the passage of the act of 1841, a notice must still issue against the sheriff, a point not necessary now to be decided, it was not necessary that such notice should appear by the record.

The record shows that a motion was made for judgment against the plaintiffs in error, as the sureties of Hill, the sheriff of Wilcox, for the failure of Hill to pay over a sum of money collected by him on an execution; the execution, its amount, time of reception of and making the money, being all particularly described, and it appearing to the satisfaction of the Court, that said defendants have had one day's notice of this motion; thereupon came a jury, &c. It is very clear, that this shows that the plaintiffs in error, were notified: was it necessary that the judgment of the Court should shew that a notice had issued to the sheriff. We are of opinion that it was not. It was only necessary for the record to show, that those against whom the

motion was made, had received notice of the intended motion, and if in the opinion of the defendants, it did not authorise a judgment, they should have appeared and contested it. Nothing more need be shown than was necessary to give the Court jurisdiction, and as no notice had been served on the sheriff, the Court had no jurisdiction to render a judgment against him.

After the judgment was rendered, it appears the defendants appeared, and on a motion in arrest of judgment, desired to introduce the notice, and by showing its insufficiency, arrest the judgment. The Court very properly refused to permit this to be done. A motion in arrest of judgment must be for matter appearing of record. A judgment is never reversed for extrinsic matter not appearing on the record itself. Tisdell's Practice, 825. There is less reason for looking beyond the record, in these summary judgments than in ordinary cases, because here nothing is presumed, but every thing necessary to give the Court the summary jurisdiction must appear.

We are of opinion, that the recital in the judgment of the notice is sufficient, and that the facts found by the jury authorised the rendition of judgment against the plaintiffs in error.

The judgment of the Court below is therefore affirmed.

BENNETT V. ARMSTEAD, FOR THE USE OF HAIR.

1. Under the act of 1837, which permits plaintiffs to prove their demands when the suit is on an account for less than one hundred dollars, the defendant is not allowed to prove an offset arising out of an account, although it is within that sum.

Writ of error to the County Court of Sumter county.

ACTION of debt on a sealed note, by Armstead, for the use of Hair, as the administrator of the estate of Hugh Torbert.—The defendant plead *nil debet*, set-off and and payment. At the trial, he proposed to prove a set-off, by his own oath. The

set-off was an account for one hundred dollars. The Court refused to allow him to do so, and he excepted.

He now prosecutes this writ of error, and assigns the same matter as error.

Horr, for the plaintiff in error, insisted, that although the statute only names the *plaintiff* as the party permitted to be sworn, yet the defendant is equally within the mischief intended to be remedied.

HAIR, contra.

GOLDTHWAITE, J.—It is too clear to admit of illustration, that the statute of 1839, cannot receive the construction insisted on by the counsel for the plaintiff in error.

The enactment is, that in all suits to be commenced upon accounts for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same shall be controverted by oath of the defendant; but this section shall not apply to the case of executors and administrators, trustees and guardians, when sued. Meek's Sup. 113, § 4.

The legislature has very properly granted this right to plaintiffs, because they must necessarily give notice to the defendant, for what he is sued, and he will always be prepared to rebut oath with oath; but if the same privilege was extended to a defendant, there would in many cases be no mutuality in the right, unless we conceive that a plaintiff is bound to attend the progress of his suit in person.

It is needless, however, to speculate on this matter, because the statute affords no pretence for the right asserted.

We have not adverted to the fact, though apparent here, that the attempt is made to enforce the off-set against an administrator, in the very face of another clause of the statute, which would not allow the account to be proved in this manner, even in a direct suit.

Let the judgment be affirmed.

DESHLER V. HODGES, USE, &C.

1. When a plea begins as an answer to a part of the declaration, and is in truth nothing more, the plaintiff cannot demur, but must take judgment by *nil dicit*, for the part unanswered. But if a plea profess in its commencement to answer more than it afterwards answers, and the part unanswered is material, and of the gist of the action, the whole plea is bad on general demurer.
2. Where, from an inspection of promissory note, it is doubtful whether the party making it, acted for himself or as the agent of another, parol evidence is admissible to remove the doubt, and show the character of the transaction.

Writ of error to the Circuit Court of Franklin.

THE defendant in error declared against the plaintiff, for money had and received, goods, wares and merchandise, sold and delivered, and on a promissory note.

The defendant pleaded *non assumpsit*, and a special plea, as follows: "And for a further plea in this behalf, the defendant comes and craves oyer of the promissory note and endorsements sued on, which are read to him in the following words:

R. Road note, \$269.97.

\$269 97. On or before the first of July next, I promise to pay Willis Hodges, the just and full sum of two hundred and sixty-nine dollars and ninety-seven cents, it being for bal. on string timber for the T. C. & D. Rail Road Co.

DAVID DESHLER,
Pr. JESSE ELLIS.

DECATUR, March 21st, 1839.

"Received on the within, twenty dollars. Aug. 13, 1839."

"And says the plaintiff should not have and maintain his action against him, because he avers the timber furnished, was delivered to said T. C. & D. R. R. Company, at Decatur, by the payee, upon a contract with said Rail Road Company, for the use and benefit of said company, and not for defendant individually.

"Defendant avers that Jesse Ellis, whose name appears in the note set forth above, was at no time his agent individually,

either before or since the signing of said note; nor has he recognised his authority since the signing. Defendant further avers, that he was before and since the date of said note, and maturity of the same, general superintendant, agent and treasurer of the aforesaid rail road company, and the aforesaid Ellis was agent of said company also, with limited special authority—that is to say, among other things, he was agent to receive timber at Decatur, for the use and benefit of the rail road company, (and not for this defendant) and give a statement of balances due from said company on that account; and under that authority, the said Ellis made the note sued on, and indorsed thereon before delivery to the payee, "Rail Road note, \$269 97." And defendant avers that payee received the note as evidence of a demand against said company, as he believes, at the time it was made and delivered to him by the said Ellis, and not as the note of this defendant. He also avers that said note was presented to him on the 13th of August, 1839, as agent and treasurer of said Rail Road Company, and in that capacity, and not individually, he paid the holder twenty dollars out of the funds of said company, and entered the credit on the note, "paid on the within, twenty dollars, August 13, 1839." He avers he did not pay any thing individually, but paid the funds of the company, upon a statement of the said Ellis, of a balance due to the payee on account of timber furnished the Rail Road Company at Decatur, and this he is ready to verify."

This plea was verified by the oath of the defendant, and demurred to, by the plaintiff.

The cause coming on for trial, the plaintiff's demurrer was sustained, and the defendant withdrawing his first plea, a jury was empannelled to assess the damages, who returned a verdict for two hundred and ninety-five dollars and sixty-three cents; and a judgment was thereupon rendered.

PECK, for the plaintiff in error, contended, that although the plea in terms may commence as a plea to the action, while it answers the count upon the note alone, yet it is manifest that it was not so intended, or so considered by the Circuit Court, or it would have been there amended, after the demurrer was

sustained. But this objection is not good on general demurrer. *Phelps v. Sowles*, 19 Wend. Rep. 547.

If it be objected that the plea is argumentative and double, it may be answered that this objection is not available on general demurrer. *Callison, et al. v. Lemons*, 2 Porter's Rep. 145.—But the plea amounts to nothing more than a denial of the authority of Ellis to make the note in the defendant's name.

WM. COOPER, for the defendant. The plea undertakes to answer the entire declaration, while in fact it merely denies the right to recover upon the count on the note. It is also bad, because it is vague, uncertain, argumentative, and presents several distinct points. (*Cavanaugh v. Tatum*, 4 Stew. & P. Rep. 208; *Manning & Adams v. Norwood*, 1 Ala. Rep. 429.) It is further objectionable, in referring to the jury the effect of the note, and seeks to let in parol evidence to contradict it.

The plea was demurrable for duplicity. *Service v. Hermance*, 2 Johns. Rep. 96; *Connelly v. Peirce*, 7 Wend. Rep. 129; *Kennedy v. Strong*, 10 Johns. Rep. 289; *Cooper v. Hermance*, 3 Johns. Rep. 315.

COLLIER, C. J.—The act of 1824, "to regulate pleadings at common law," is certainly very liberal in its provisions; enacting among other things, that "no demurrer shall have any other effect than that of a general demurrer;" and if the only objection to the second plea, was duplicity and argumentativeness, we should be prepared to say, that the judgment of the Circuit Court was erroneous. But it is insisted, that the plea is defective, because it does not present a defence to the entire declaration. It is a rule in pleading, that every plea must answer the whole declaration, or all that it assumes in the introductory part to answer. Where a plea begins as an answer to a part, and is in truth nothing more, the plaintiff cannot demur, but must take a judgment for the part unanswered by *nil dicit*; and it is said, if he demur or plead over, the whole action is discontinued. But if a plea profess, in its commencement, to answer more than it afterwards answers, the whole plea is bad, and the plaintiff may demur; this rule, however, is to be understood with the qualification, that the part of the declaration which is professed to be, but not answered by the plea, is material, and of the gist of the action. 1 Chitty on Plead. 509.

It is admitted that the plea assumes to answer the entire declaration, and is in fact responsive only to the count on the note; but this objection, it is insisted, can only be taken advantage of by special demurrer. To show that the argument is not defensible, it is only necessary to consider the nature of the objection. A defendant undertaking to plead to the *action*, must interpose such a plea as will put in issue all the material averments of the plaintiff, so that if it is admitted or proved to be true, the suit will be ended, and the defendant entitled to judgment. Now suppose the Court should have adjudged the plea to have been good, would it be pretended that the plaintiff could not proceed upon his count for money had and received, &c? We think not. And if the plea does not constitute a defence to the extent to which it professes to go, it must be defective in substance. The case of *Phelps v. Sows*, 19 Wend. Rep. 547, cited for the plaintiff in error, instead of showing the law to be different from what we have stated it, is an authority to show that the view we have taken, is correct. See also, 1 Chitty's Plead. 509, and cases there cited.

The defendant's plea was doubtless intended as a denial of the authority of Ellis, to make the note in his name; also, averring that it was given and received for, and on account of the Rail Road Company, and not as an individual charge upon him. If it were not for the objection, we have considered, it is probable, that under the influence of the act of 1824, already cited, it would be holden good; although it is both argumentative and double. It is no objection, that if issue were taken on the plea, it would admit parol evidence to show, that the Rail Road Company were liable to pay the note. In *Lazarus v. Shearer*, 2 Ala. Rep. 718, it was held, that such proof was admissible, where from an inspection of the paper, it appeared to be doubtful, whether the party making it was to be personally responsible; and the authorities cited in that case, show that such is the law.

The indorsing on the note at the time it was made, "Rail Road note, \$269 97," together with the evidence afforded by its inspection, is quite sufficient to admit parol evidence to show that it was intended only to bind the company, and so received by the payee. But for the insufficiency of the plea in the point first noticed, the judgment must be affirmed.

BOREN, *et al.* v. CHISHOLM.

1. The prosecution of a writ of error from a decree of the chancellor, dismissing a bill, by which a judgment at law had been enjoined, does not reinstate the injunction and supersede the issuance of an execution, on the judgment at law, although a bond be given with sureties for the prosecution of such writ of error in double the amount of the judgment at law.

Motion for affirmance of a decree of the Chancery Court at Montgomery.

PECK and CLARKE, for defendant in error.

ORMOND, J.—The defendant in error presents to this Court a certificate of the Register of the Chancery Court at Montgomery, which recites that the plaintiffs in error filed their bill in equity, and obtained an injunction to a judgment at law, obtained by the defendant in error, against them, in the Circuit Court of Montgomery, for the sum of one thousand nine hundred and sixteen dollars, and that afterwards, at the June term of the Chancery Court, 1841, a decree was made, dismissing the bill, and that the injunction bond have the force and effect of a judgment, and be so certified to the Court of law. That afterwards, the plaintiffs in error applied for and obtained a writ of error, returnable to the present term of this Court, and entered into bond with surety, to prosecute their writ to effect, and to satisfy the judgment at law, which was enjoined according to the order and decree of this Court; whereupon the order and decree of the Court of Chancery was, and is superseded.

The record of the suit in chancery, not being filed pursuant to law, the defendant in error moved for an affirmance of the decree of the Court below, with ten per cent. on the amount of the judgment at law.

The question to be determined is, whether the writ of error taken from the decree of the Chancellor, dismissing the bill, revives the injunction. The case of *Garrow v. Carpenter & Hanrick*, 4 Stew. & Por. 336, determined that the injunction in such a case as the present, was not revived, nor the execution

at law superseded. But it is supposed that the 16th section of the act of 1841, to regulate the practice in the Courts of Chancery, was designed to change the law in this particular. It provides, "that when an appeal or writ of error is taken to the Supreme Court from the decree of a Chancellor, all further proceedings on said decree, shall be thereby suspended: *Provided*, the appellant give bond, with security, as in cases of error to the Courts of law."

We do not think the legislature intended by this act to declare that the injunction should be reinstated by the suing out of a writ of error to the decree dismissing the bill. If such had been the design, express provision would doubtless have been made for the sum in which the bond was to be taken, which would have this effect. Great embarrassment would arise too, in many cases, in ascertaining the rights of the sureties to the injunction and writ of error bonds. Besides, the issuance of an execution upon a judgment at law, suspended by an injunction of the Court of Chancery, cannot be said to be a proceeding under the decree dissolving the injunction. The injunction was a prohibition to issue the execution, until the Chancellor could inquire into the complaint—its dissolution cannot, with propriety of language, be said to give power to issue the execution, but merely removes a temporary restraint to the exercise of a power which exists, independent of the Chancellor. The issuance of an execution therefore, in such a case, is not a "*proceeding on the decree*," and therefore, certainly not within the letter of the law, and such serious inconveniences might, and probably would, arise from such a construction, that we cannot think it was in the contemplation of the legislature in the enactment.

Nor is this enactment inoperative, unless the construction contended for, is placed upon it. In the case of *Weatherford, et als. v. James*, 2 Ala. Rep. 170, we held that a decree was final, when it ascertained all the rights of the parties in litigation, though ministerial acts remained to be done. And it is not at all unusual for a Court of Chancery to decree a sum of money to be paid where there has been no previous judgment at law; in all such cases, the act would apply, and was, to say the least, proper, as a declaratory act of what was before considered, somewhat doubtful, there, being no statute expressly

authorizing a writ of error to the decree of a Court of Chancery, though in practice, it had been allowed.

For these reasons, we are of the opinion that the prosecution of a writ of error to a decree, dismissing a bill enjoining a judgment at law, does not reinstate the injunction, and supersede the issuance of an execution on the judgment at law, although a bond has been given with sureties, in double the amount of the judgment at law, for the prosecution of the writ of error:

It results from this opinion, that as the execution at law, was not superseded by the prosecution of the writ of error, that no damages can be given in this Court, on the judgment at law.—The result of the motion, in this case, is merely to affirm the decree of the Chancellor.

SPROWL, *et al.* v. SIMPKINS.

1. A note, payable to J. E. or bearer, made previously to the enactment of the statute of 1837—Meek's Supplement 108—improperly sued in the name of one who holds it by delivery without any indorsement from J. E. the payee.

Writ of error to the Circuit Court of Barbour county.

ASSUMPSIT on a promissory note, dated 2d October, 1835, payable to John Ethridge, or bearer on the first, day of January, then next.

The declaration avers, that the note when made by the defendants, was delivered to one Slaughter, who indorsed it to the plaintiff.

The defendants appeared and suffered judgment by *nil dicit*.

They now prosecute this writ of error, and assign, that the plaintiff shows no title to sustain this action, nor does the record show that the note was produced when the judgment was rendered.

PHELAN, for the plaintiffs in error, cited, Meek's Supplement, 108.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The statute passed in 1837, requires notes, payable to bearer, to be assigned by the person whose name is mentioned on the face, before a suit can be maintained in the name of the holder: Meek's Sup. 108. But it has no operation on notes then in existence.

As this is the only question insisted on, the judgment must be affirmed.

MCKENZIE & CURRIE V. MCCOLL, JUDGE, &C. USE.

1. The real estate of an intestate was sold by commissioners under the order of an Orphan's Court and a note taken from the purchaser; at the same time it was agreed between the commissioners and the purchaser, that the note should be paid only in proportion to the interest it should afterwards appear the intestate had in the land; a suit being brought in Equity to ascertain the intestate's interest, during its pendency, an action was brought on the note, to which the foregoing facts were specially pleaded in bar.—*Held*, that the plea was bad on demurrer, and if the matter was available as a defence, it should be pleaded in abatement.
2. If in an action on a promissory note, the jury return a verdict for an amount beyond what appears from the declaration to be due, the defendant, instead of prosecuting a writ of error, should seek its correction, by asking a new trial.
3. It is not error to charge a jury that the Orphan's Court when regularly applied to, had the right to authorize the sale of the real estate of deceased persons to pay debts, and that a sale made under an order of that court would transmit the title—there being nothing in the record to show its incorrectness, or that the intestate had not at the time of his death, both the legal and equitable estate coupled with the possession.

THE defendant in error, brought an action of *assumpsit* against the plaintiffs in the Circuit Court of Barbour, on a promissory note, of the following tenor.

"\$1836 66-100: Six months after date, we or either of us promise to pay Alexander McColl, Judge of the County Court

McKenzie & Currie, p. McColl, Judge, &c. use.

of Barbour county, or bearer, eighteen hundreded, thirty-six 66-100 dollars, value received.

February 4, 1839.

DANIEL MCKENZIE,
JOHN CURRIE."

The defendants pleaded :

1. *Non Assumpsit*.
2. Failure of consideration.
3. Want of consideration.
4. That the note declared on, was given in part consideration of certain lands of James Pugh, deceased, sold to said McKenzie, under an order of the Orphans' Court. The amount of Pugh's interest in the lands being uncertain, the same being claimed by one John Currie, as having been purchased by Pugh, for his use, it was at the time of the sale and making the note, agreed by the commissioners with McKenzie, that the note in suit, and other notes given for the purchase money of the lands, should be paid only in proportion to the interest which it might be afterwards decided Pugh had in the lands. And the defendants aver that a suit is now pending in equity to ascertain the interest of Pugh, in the lands.

There was a demurrer to the fourth plea, and although no judgment appears to have been rendered thereon, yet the parties have admitted on the record, that there was a judgment sustaining it; the record does not show that issues were joined on the first, second and third pleas; the case however, was submitted to a jury, as the judgment entry recites, on issue joined, and a verdict was returned for the plaintiff, for the amount of the note and interest.

On the trial, the defendants excepted to the ruling of the Court. By the bill of exceptions, it is shown that the note sued on was given for the lands of an insolvent intestate, sold by commissioners, under an order of the Orphans' Court of Barbour county. At the time of the sale, a stranger was in possession, and has been ever since, though there was some evidence tending to show the defendant's assent to that possession. It appeared that the intestate's title to the lands being disputed, the commissioners, at the time of the sale and making the note, gave the defendants a memorandum in writing, by which it was agreed between them and defendant, that the note should be

paid, only in proportion to the interest, it should afterwards appear intestate had in the lands. It also appeared, that a case was pending in chancery, at the suit of the intestate's surviving partners, claiming the lands as partnership funds, and seeking to apply them to partnership debts.

The Court charged the jury, that the Orphans' Court had jurisdiction of the subject, and that a sale under an order of that Court would transmit the title.

The Court further charged, that although the memorandum might have the effect of so modifying the note, that it should not be the subject of a suit, while the litigation of the title was undecided, yet the defendant could not avail himself of such a defence under the state of the pleadings; that it could only be taken advantage of by plea in abatement, or subsequent to a judgment, and after a decree was made by bill in equity. To which charges the defendants excepted, &c. and a judgment being rendered on the verdict of the jury, the defendants have prosecuted a writ of error to this Court.

BUFORD, for the plaintiffs in error—contended:

1. The demurrer was improperly sustained to the fourth plea. The facts alleged in that plea may have been admissible as evidence under the general issue, yet that would only make it bad on special demurrer, while all demurrers in this State, are to be considered as general. Aik. Dig. 9; 1 Chitty's Plead. 500.

2. The verdict and judgment are for a larger amount than was due on the note for principal and interest.

3. The first charge was too broad, and was calculated to mislead the jury, and is indefensible in itself. The second charge is also opposed to authority and practice. 1 Chitty's Plead. 470, 1, 2 and 3.

HARRIS, for the defendant—insisted:

1. The matter set out in the fourth plea, is not available in bar of the action, but should have been pleaded in abatement. Perkins v. Gilman, 8 Pick. Rep. 229; Winans v. Huston, 6 Wend. Rep. 471; see also 11 Pick. Rep. 156.

2. The second ground of objection cannot be entertained on error, as the judgment was rendered on a verdict; if the defendants are aggrieved by the recovery of a sum beyond what

was due, they should have applied to the Circuit Court for a new trial. *Baldwin v. Stebbins*, Min. Rep. 180.

3. So far as the evidence is disclosed by the bill of exceptions, there is no error in the first charge, and the Court will not intend that other facts were proved at the trial, for the purpose of reversing. *Johnson v. Ballew*, 2 Porter's Rep. 29. The argument on the fourth plea, shows that the second charge was entirely correct.

COLLIER, C. J.—The matter set out in the fourth plea, does not show that the plaintiff never can maintain an action for the non-payment of the note declared on, and is improperly pleaded in bar. Wherever the subject matter of the defence is, that the plaintiff cannot maintain an action at any time, it should generally be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the defendant is forever concluded, should, in general, be pleaded in abatement. 1 Chitty's Plead. 434.

In the case before us, the plea, at most, shows that the plaintiff's right of action was suspended by the agreement made with the commissioners, until it was ascertained what interest Pugh had at the time of his death, in the lands sold by them. If it should be determined that he had none, then and not sooner were the defendants relieved from the contingent liability to pay their note. The facts alleged then, are a mere assertion that the action was prematurely brought, and according to a well established principle, must have been pleaded in abatement. 1 Chitty's Plead. 443; *Collier v. Crawford*, Minor's Rep. 100. The matter of the plea may be assimilated to a covenant, not to sue within a given time, or until the happening of a certain event; if the suit is brought too soon, the action can only be abated. *Prescott v. Tufts*, 7 Mass. Rep. 209; 5 Dane's Ab. Ch. 176, Art. 9. § 10; *Platt on Cov.* 574. But where there is a covenant perpetual not to sue, it amounts to a release, and may be pleaded in bar. *Platt on Cov.* 574.

2. The judgment, if not for the precise sum due on the note, is for very little more; but even were it otherwise, it furnishes no ground for its reversal or correction. The jury have ascertained by their verdict, what the plaintiff was entitled to recover, and the judgment conforms to their finding; and the de-

defendants remedy according to repeated decisions of this Court, was by an application to the Court below, for a new trial. *Baldwin v. Stebbins*, Minor's Rep. 180; *Moore v. Coolidge*, 1 Porter's Rep. 280.

3. The first charge of the Circuit Court, may, under some circumstances, have been improper, while under others, it would be strictly correct, but there is nothing in the record to show that it was unauthorised. The intestate, Pugh, for any thing appearing to the contrary, may have had both the legal and equitable estate coupled with the possession. Upon that supposition the charge is unobjectionable; for the law vesting the Orphans' Court with authority to decree the sale of the real estate of deceased persons for the payment of debts, &c. its decree would have the effect to transmit the title of lands thus sold to the purchaser. Beyond this, we do not understand the charge to go.

What we have said upon the demurrer to the fourth plea, shows that the second charge of the Court was quite as favorable to the defendants, as the law would permit.

There is no available error in either of the points made by the plaintiffs in error, and the judgment of the Circuit Court is consequently affirmed.

Judge GOLDTHWAITE being related to the person for whose use the action was brought, did not sit in this cause.

PHARR & BECK v. REYNOLDS.

1. The sickness of a party to a suit, or the pendency of another suit against him requiring his attendance, will not authorize the interference of a court of chancery after judgment. It was the duty of the party to send an agent to attend to his cause, or to put his attorney in possession of the means of continuing it.
2. A court of chancery will not grant relief in the nature of a new trial at law, after judgment on a plea in abatement.
3. When Chancery has jurisdiction to state an account between parties, it will enjoin a judgment at law, obtained by the party against whom the account is prayed, if he be insolvent.

Error to the Chancery Court at Talladega.

THIS was a bill in chancery, filed by the plaintiffs in error, against the defendant in error. The bill charges, that the plaintiffs in error, kept a public house at the Talladega Springs, and employed the defendant to assist in the management of the house, for his board, lodging and his bill at the bar, and deposited with him eight hundred dollars, to buy provisions for the house; that defendant remained four or five months, but from intoxication, was unable to attend to business, and was dismissed; that defendant did not expend more than three hundred dollars, for provisions, and is indebted to complainants for the remaining five hundred dollars.

That defendant instituted suit against complainants, in the Talladega Circuit Court, for work and labor; and complainants being residents of Wilcox county, at the return term, pleaded that fact in abatement of the suit. That complainants summoned their witnesses and sent the patents, the evidence of their freehold in Wilcox, but the witnesses did not attend, and the patents miscarried; that complainants from sickness, were unable to attend the Court at Talladega, and in addition, had an important suit in Wilcox county, which required their attention at the same time; that complainants attorney, not knowing of the materiality of the absent witnesses, could not obtain a continuance, and that the defendant unjustly obtained a judgment against them, which he is seeking to enforce by execution.

That if they had been able to make their defence at law, on

the merits it consisted of matters of account, which a jury could not properly adjust. That the defendant is utterly insolvent, and has left the country.

The prayer of the bill is for an injunction to the judgment at law, that an account be taken between the parties, and for general relief. The Chancellor dissolved the injunction, and dismissed the bill. To reverse which, the plaintiffs have sued out this writ of error.

B. F. PORTER, for the plaintiff, in error—insisted that this case was distinguishable from *French v. Garner*, 7 Porter, 553, and cited 9 Danna, as a case in point. He also insisted, that the bill was filed for an account, which gave the Court jurisdiction: 8 Porter, 63.

W. B. MARTIN, contra—contended, that there was no equity in the bill, and no excuse shewn for not defending at law. He cited 7 Porter 533; 1 Ala. Rep. 351.

ORMOND, J.—It is very certain that the plaintiffs in error, do not, in their bill, show any ground for overhauling the judgment obtained at law, by the defendant. The cases cited by the counsel, for the defendant in error, are decisive to show that this case is not, at least in this mode relievable in equity. There is a total want of that diligence, which the Court of Chancery requires, before its interposition can be obtained. If, as does not sufficiently appear, from the bill, the plaintiffs, from the necessity of attending to another suit, from sickness, or from any other cause, were unable to attend the Court, they should have sent an agent, or at least, should have placed their attorney in possession of the means, for trying or continuing the suit, if the witnesses did not attend. But independent of these considerations, we apprehend no case can be found, in which a Court of Chancery has interfered to grant relief, in the nature of a new trial at law, after judgment on a plea in abatement.

The bill, however, is also filed to obtain an account from the defendant. The allegation is, that he was employed by them, to aid in the management of a house of entertainment at the Talladega Springs; that they placed in his possession, eight hundred dollars, to buy provisions for the house; they allege,

that he did not expend more than three hundred dollars of the money for the purposes for which he was intrusted with it, and that he has never accounted with them. There can be no doubt that the facts stated, will give the Court jurisdiction to entertain the bill for an account. The defendant was the bailiff, in technical language, of the complainants, against whom the ancient common law action of account could have been maintained, and of which Courts of Chancery have concurrent jurisdiction; and this would seem to be a case peculiarly proper for a Court of Chancery, as the disbursements of the bailiff, or agent, must have consisted of many items. There is still, however, a question of some difficulty, which does not appear to have been presented to the Chancellor; it is, whether the fact alleged, in the bill, of the insolvency of the defendant, and that he has left the State, will authorise this Court, to enjoin the judgment at law, until the account can be taken. Although the question is not free from difficulty, we are strongly inclined to think the plaintiffs are entitled to the aid of the Court, upon the principle upon which it interferes to prevent irreparable injury, as in cases of waste.

If the defendant is permitted to enforce his judgment at law, the decree in favor of the complainants, if they are able to obtain one, will be of no value, whilst on the other hand, if the claim of the complainants is unfounded, the injury to the defendant, will be merely a temporary suspension of his rights. If the defendant was a resident of the State, but about to leave it, the complainants would be entitled to a *ne exeat*, or if he had property in the State, it could be attached at law, which does not, in principle, differ from granting the injunction in this case and permitting the judgment obtained by the defendant, to stand as a fund, out of which to satisfy any decree the complainants may obtain.

In *Simpson v. Hart*, 14 Johns. Rep. 63, the Court of Errors of New York, where a bill was filed, to set off one judgment against another, considered that the insolvency of one of the parties, was a material fact in granting the relief: see also, *Pond v. Smith*, 4 Conn. Rep. 305, which is expressly in point.

Upon the whole, we are of opinion, that although the complainants cannot overhaul the judgment at law, obtained against

them, yet, in equity, it should stand as a security for their claim against the defendant.

The decree of the Chancellor, therefore, dissolving the injunction and dismissing the bill, is reversed, and this Court, proceeding to render such decree, as the Chancellor should have rendered, does hereby order, adjudge and decree, that the injunction granted in this cause, to the judgment at law, be continued, and that an account be stated by the master, between the parties: that the judgment obtained by the defendant stand as a security for such amount as may be decreed in favor of the complainants, on the settlement of the accounts between the parties, and for this purpose, let the cause be remanded.

CORNER V. CORNER.

1. A Judge of the County Court has no authority to award a writ of *certiorari*, returnable into the Circuit Court, in a suit for a forcible entry and detainer.

Writ error to the Circuit Court of Cherokee county.

ANNA CORNER commenced proceedings against Robert Corner, before a Justice of the Peace, of Cherokee County, for a forcible entry and detainer, in which she recovered a judgment.

The Judge of the County Court of that county, on the petition of the defendant, awarded a writ of *certiorari*, returnable into the Circuit Court.

On the return of this writ into the Circuit Court, it was quashed, in consequence of a want of authority in the Judge, awarding it. The defendant now prosecutes his writ of error, and assigns, the refusal of the Circuit Court to entertain jurisdiction of the case.

MOORE, for the plaintiff in error—cited, Meek's Sup. 82.

PHELAN, contra—cited, Dunham v. Carter, 2 Stewart, 496.

GOLDTHWAITE, J.—The act of 1840, provides that the Judges of the County Courts, shall have power to grant *certiorari's*, returnable to the Circuit Courts in the same manner that they are allowed to grant the same returnable to their own Courts: Meek's Supplement, 82. But this gives them no authority to award writs of *certiorari*, in cases of forcible entry and detainer, because these writs, previous to the statute, could not be made returnable to the County Courts. The only effect intended by this act, was to allow the judges of the County Court, to send such cases to the Circuit Courts, as they might have concurrent jurisdiction over, by means of the *certiorari*, and the terms of the statute apply solely to the ordinary actions before Justices of the Peace.

The judgment of the Circuit Court is affirmed.

PEARSALL V. PHELPS.

1. The declaration described a judgment recovered at ——— in the county of Richmond, in the State of New-York, by and before the Supreme Court of Judicature for said county and State; the exemplification produced, was a judgment rendered by the Supreme Court of Judicature of the people of the State of New-York, at the city of Albany—*Held*, that the record offered in evidence, was not admissible under the plea of *nul tiel record*.

Writ of error to the Circuit Court of Lauderdale.

THIS was an action of debt in the Circuit Court of Lauderdale, at the suit of the defendant in error, against the plaintiff, upon the exemplification of a judgment rendered in a Court of the State of New York.

The cause was tried on the plea of *nul tiel record*, and the defendant excepted to the ruling of the Court, by which it was determined, that the exemplification was admissible evidence under the pleadings. The declaration thus introduces the plain-

tiff's cause of action: "For whereas the said Elisha Phelps, heretofore, to wit, on the 30th day of October, 1836, at — in the county of Richmond, in the State of New York by and before the Supreme Court of Judicature, for said county and State, at, to wit, in the county of Lauderdale aforesaid, by consideration and judgment of the same Court, recovered against the said defendant" &c. The exemplification offered in evidence, commences as follows: "Pleas before the Justices of the Supreme Court of Judicature of the people of the State of New York, at the capitol, in the city of Albany, of the term of January, 1836." By looking into the record, we learn that the pleadings in the cause in New York, were made up in the Supreme Court of Judicature of that State, sitting at the city of Albany, though the declaration commences thus: "Richmond county, ss. Elisha Phelps, plaintiff in this suit" &c. and the venue is laid in that county. The judgment appears to have been rendered before the Justices of the same Court, was filed on the 13th and signed on the 30th October, 1836.

The transcript is attested by the Clerk of the Supreme Court of Judicature of the people of the State of New York, as a copy from the records of his office, and the Chief Justice of that Court adds his certificate, pursuant to the act of Congress.

McCLUNG, for the plaintiff in error.

COLLIER, C. J.—A distinction, it is said, is established between allegations of matter of substance, and allegations of matter of description. The former, may be proved substantially; the latter, must be proved with great exactness. *Pearcell v. Macnamara*, 9 Ests. 157; *Phillips v. Shaw*, 4 B. & A. Rep. 435; *Walters v. Mace*, 2 B. & A. Rep. 758, '9, 1 *Chitty's Plead.* 304. That is, it is sufficient to establish an allegation of matter of substance by showing a state of facts, the meaning, and legal effect of which, is in harmony with the matter alleged. But if a party undertakes to set forth a written instrument *in hæc verba*, his averments and proof, must correspond most strictly, and if in the recital, he varies in a word or letter, so as thereby to create a different word, it is fatal. *Sheechy v. Mandeville*, 7 Cranch's Rep. 208, 217; *Commonwealth v. Stow*, 1 Mass. Rep. 54; *The State v. Coffey*, 2 Mur-

phely's Rep. 321. If, however, the instrument is merely described by its substance and effect, there will be no variance, if the proof and the allegations agree in all essential particulars. Thus, in *Page v. Woods*, 9. Johns. Rep. 82, which was an action against a sheriff for an escape, the declaration alleged a judgment, recovered in the Court of Common Pleas, held at Salem, in Washington county; in the record produced, the place in which the Court was holden, did not appear; this, it was held, was not a material variance, as the law had prescribed the place where the Court should be holden. But where, in a plea of justification, an execution issued by a Justice of the Peace, was described as returnable in ninety days, when it was in fact, returnable in sixty days, the variance was considered fatal: *Toof v. Bentley*, 5 Wend. Rep. 276. And a similar conclusion was attained, where in an action for maliciously bringing a civil suit and demanding excessive bail, the plaintiff's declaration alleged, that the writ upon which he was held to bail, was returnable on the first Monday of December, 1809, whereas it was in truth, returnable on the first Monday in March: *Munns v. Dupont*, 3 Wash. C. C. Rep. 31. So in an action against the sheriff on the statute, 8 Ann, c. 14, for taking goods off the premises, without paying rent; the declaration stated, that "by virtue of, and under pretence of a certain writ, of our said lord the King, before the King himself, before that time, sued out, the defendant took," &c. it was held, that a writ issued from the Common Pleas, did not sustain the averment: *Sheldon v. Whitaker*, Ry. and Mood. Rep. 366; *Impey v. Taylor*, M. & S. Rep. 166.

Where debt was brought upon a decree in chancery, for £860—12,—1, and the decree was for that sum, with interest from a certain day, to the day of the rendition of the decree, the variance was held fatal: *Thompson v. Jameson*, 1 Cranch's Rep. 282. See *De Kentland v. Somers*, 2 Root's Rep. 437; *Dillingham v. United States*, 2 Wash. C. C. Rep. 422.

In conclusion, upon this point, it may be well to remark, that the general doctrine of variance is very similar, whether applied to a record, specially, or other inferior grade of written evidence; and it may be laid down as a general proposition, sustained by most of the decisions, that when the variance does not change the nature of the writing, so as to render

the one set out, a different instrument in legal contemplation from that offered in evidence, it will not be regarded fatal to the action or defence: *Ferguson v. Harwood*, 7 Cranch's Rep. 408, 414; *Silver v. Kendrick*, 2 New Hamp. Rep. 160; *The Commissioners, &c. v. Muse*, 1 Const. Rep. So. Caro. 465, 3 Phil. Ev. C. & H's Notes, 518 to 527.

We have thought it proper to take this brief view of the law of variance, for the purpose of ascertaining principles by which we might be guided to a correct conclusion in the case before us; esteeming it safer to rest our judgment upon the approved decisions of other Courts, than to rely upon our own unassisted reasoning.

In the case at bar, it is insisted, that the exemplification offered in evidence, does not correspond with the declaration. The allegation describes a judgment, recovered at ———, in the county of Richmond, in the State of New York, by and before the Supreme Court of Judicature for said county and State. The judgment produced, appears to have been rendered by the Supreme Court of Judicature of the people of the State of New York, at the city of Albany. We must look alone to the exemplification, for the purpose of ascertaining in what Court, the judgment authenticated was rendered; and as a designation of the Court alleged in the declaration, is materially different from that described in the transcript adduced at the trial, we cannot know, that though differently designated, there is in fact but one tribunal. There may be a Supreme Court of Judicature, holden in the county of Richmond, and the natural inference, from the declaration is, that the judgment described, was rendered there; while that produced, appears to have been rendered in the Court holden at Albany. We cannot intend that every thing stated in relation to the county of Richmond, is immaterial, nor are we permitted to reject it as surplusage, for it must be regarded as descriptive of the judgment, and the evidence being defective in this respect, we think it should not have been received by the Circuit Court.

We infer from the exemplification, that it is the practice in New York, to make up the pleadings in the Supreme Court, and send the cause for trial to the county in which the venue is laid, and after the issue is disposed of, to return the cause, with the proper indorsement, that the Supreme Court may

render judgment. So that in point of fact, as well as law, the judgment is the act of the Supreme Court, and should be declared on as such.

The consequence is, the judgment of the Circuit Court is reversed, and the cause remanded.

LEE V. HAMILTON, ADM'R.

1. The exemplification of a record from the State of Georgia, in these words—"Georgia, Greene County Court of Ordinary, 30th September, 1803. The within will and testament of John Finlay, dec'd, proven in open Court, by the oaths of James Wood and John Wood, subscribing witnesses to the same, who declared, they saw the same signed and acknowledged by him the said John Finlay, in his proper senses, and saw E. Park and John Buckner subscribe their names as witnesses with themselves. Thomas Carleton, Clerk. Recorded, 30th September. Thomas Carleton, Clerk,"—accompanied by a certificate, in proper form, by a succeeding Clerk, that the above, together with a copy of the will, was a true copy of the last will and testament of John Finlay, from the records of his office; and also, by a certificate of the chairman of the Court, that he was clerk—and his certificate in due form—Held, that the transcript was properly authenticated, and that the record showed that the will had been admitted to probate in the State of Georgia, and admissible in evidence in the Courts of this State.
2. Admissions of a party, are evidence against himself, but will not authorise the introduction of proof of counter declarations, made at a different time.

Error to the Circuit Court of Clarke.

THIS was an action of detinue by the defendant in error, as administrator of his wife, to recover of the plaintiff in error, certain slaves.

Upon the pleas of the general issue, and the statute of limitations, the plaintiff obtained a verdict and judgment.

On the trial of the cause, a bill of exceptions was taken by the plaintiff in error, from which it appears that the plaintiff offered in evidence a copy of the record of a will of John Finlay, deceased, in the Court of Ordinary of Greene county, in the State of Georgia, through which he claimed the slaves in the

present action. To which the defendant objected. The probate is as follows:

GEORGIA, GREENE COUNTY,

Court of Ordinary, 30th September, 1803.

The within will and testament of John Finlay, deceased, proven in open Court, by the oaths of James Wood and John Wood, subscribing witnesses thereto, who declared they saw the same signed and acknowledged by him, the said John Finlay, in his proper senses, and saw E. Park and John Buckner, subscribe their names as witnesses with themselves.

THOMAS CARLETON, Clerk.

Recorded 30th September, 1803.

THOMAS CARLETON, Clerk.

GEORGIA, GREENE COUNTY.

I, Thomas W. Grimes, Clerk of the Inferior Court when sitting for ordinary purposes, for the county and State aforesaid, do hereby certify that the foregoing exemplification contains a true copy of the last will and testament of John Finlay, deceased, taken from the records of my office, Book D, page fifty-four.

Given under my hand and seal of office, this 17th June, 1836.

THOMAS W. GRIMES, Clerk.

Greene Court of Ordinary.

GEORGIA, GREENE COUNTY.

I, Thomas Stocks, Chairman of the Inferior Court, when sitting for ordinary purposes, for the county and State aforesaid, do hereby certify, that Thomas W. Grimes, whose signature appears attached to the foregoing certificate is at this date, the acting clerk of the Court of Ordinary, for the county of Greene, and State aforesaid, duly appointed and commissioned, and whose attestation as such, is intitled to all due faith and credit, his certificate in due form, and signature genuine.

Given under my hand, this 17th day of June, 1836.

THOMAS STOCKS, Chairmain

Inferior Court, Greene Co. Ga.

The Court overruled the objections to the will and probate, and permitted it to be read to the jury.

The plaintiff was also permitted to prove, though objection was made by defendant's counsel, that John Dean, senior, the father of plaintiff's wife, and through whom defendant claimed,

had on two occasions, in 1817, or 1818, and in the year 1823, on the morning of the marriage of plaintiff with the daughter of Dean, declared that Hannah and her children, were the property of his daughter, given to her by her grand-father.

The defendant then offered to prove by witnesses, that John Dean, senior, was in the habit of declaring that he gave the negroes in controversy, to different members of his family. Sometimes he would say, it was the property of one of his children, and at other times, that it belonged to a different one, and was in the habit of making such contrary declarations of gifts, for twenty or thirty years before his death, but that he never would or did give any of his children possession of his negroes, in pursuance of such promises; which proof being objected to by plaintiff's counsel, was excluded by the Court; to all which the defendant, by his counsel, excepted, and now assign for error.

Other testimony was also offered and rejected, but not being noticed in the argument of counsel, or by the Court, is not stated.

B. F. PORTER, for plaintiff in error, contended that there was no evidence that the will had ever been admitted to probate; that the action on it in Georgia, was the mere act of the clerk; that this was the mere copy of a copy, and therefore, not evidence, and cited Aik. Dig. 250, § 22; 2 A. K. Marshall, 555; 1 Ala. 529; 4 Philips' Ev. 1065, 1137; 3 Littel, 479; 2 Cain, 363; 3 Rand. 167; 4 Wend. 543; Buller N. P. 246; 3 Starkie, 1682. As to the declarations of Dean, he cited 1 Philips' Ev. 231; 2 ib. 585; 1 Starkie's Ev. 50; 15 Johns. 292.

PECK and CLARKE, contra.

ORMOND, J.—The principal argument urged in this case is, that the transcript of the will of John Finlay, deceased, as certified by the clerk of Greene county, in the State of Georgia, is not sufficient to authorise it to be read as evidence in our Courts. The objection is, first, that it does not appear that there was any probate of the will in Georgia; and second, that it is not sufficiently authenticated as a record, under the act of Congress.

1. The record commences with what purports to be a trans-

cript of the will of John Finlay, deceased, which is followed by the following certificate:

GEORGIA, GREENE COUNTY,

Court of Ordinary, 30th September, 1803.

The within will and testament of John Finlay, deceased, proved in open Court, by the oaths of James Wood and John Wood, subscribing witnesses to the same, who declared they saw the same signed and acknowledged by him, the said John Finlay, in his proper senses, and saw E. Park and John Buckner subscribe their names as witnesses thereto.

THOMAS CARLETON, Clerk.

Recorded 30th September, 1803.

THOMAS CARLETON, Clerk.

This is followed by a certificate of Thomas W. Grimes, who styles himself Clerk of the Inferior Court of Greene county, sitting for ordinary purposes, and certifies that the foregoing exemplification contains a true copy of the last will and testament of John Finlay, deceased, taken from the records of his office. To which is added the certificate of the Chairman of the Court, that Grimes is its Clerk, and that his certificate is in due form.

The objection urged is, that the certificate of Carleton does not show that there was any action of the Court declaring that the will was proved by the oaths of the subscribing witnesses, to have been duly executed, and that it appears to have been his own act merely. If faith is placed in the certificate of Grimes, we think it follows conclusively, that the will was proved. It is clear, that the certificate signed by Carleton, was endorsed on the will itself, at the time of the probate, and the will and certificate transferred to the records of the Court. The language admits of no other interpretation. "The within will and testament of John Finlay, proved in open Court by the oaths," &c. is a declaration by the organ of the Court, that certain facts transpired in "open Court," that is, in presence of the Judge, and with his assent. It certainly cannot be presumed by us, that an act done in *open Court*, had not the approbation of the Court, but was the mere unauthorised act of the clerk.—We think it very clear, that the will was admitted to probate in Georgia; with the mode of doing this, we have no concern.

2. Is the transcript properly authenticated under the act of

Congress, of May 1790? That act provides, that the records and judicial proceedings of the Courts of any State, shall be proved or admitted in any other Court within the United States, by the attestation of the Clerk and the seal of the Court annexed, if there be one, together with a certificate of the Judge, Chief Justice or presiding magistrate, that the attestation is in due form. 1 Story's Laws U. S. 93.

In *Dozier v. Joyce*, 8 Porter, 311, we held that the decision on the probate of a will, was a judicial proceeding, and the Court in which it is registered, a Court of Record within the meaning of the act of Congress, and we then sustained the certificate of an officer of Edgefield District, South Carolina, who styled himself sole Judge of the Court of Ordinary, and also keeper of the records, and that he had the power to attest his record in the capacity of both Clerk and Judge. But in this case, the certificates of the Clerk and Judge, are within the letter of the act of Congress, the former being authenticated by the seal of his Court, and were properly admitted in evidence.

The declarations of John Dean, senior, the father of the plaintiff's wife, and through whom the defendant below claimed, were properly given in evidence. It appears that the negro woman, Hannah, sued for in this action, was bequeathed to the plaintiff's wife by her grandfather, John Finlay, and that during the minority of Mrs. Hamilton, the negro was in the possession of Dean, her father, at which time, on two several occasions, he disclaimed owning the negro, and said she belonged to his daughter, the plaintiff's wife. These declarations were certainly evidence against him, or any one claiming through him. The counter declarations of Dean at other times, were properly excluded. When the admissions of a party are given in evidence against him, any thing said by him at the same time, qualifying or controlling such admission, will be evidence for him, or in other words, any one seeking to take advantage of such admission, must take the whole together, that which makes against, as well as that which is in his favor.— But a party will not be permitted to neutralize or destroy the effect of an admission, by evidence of counter declarations at another time, which indeed would be permitting him to manufacture testimony for himself.

Some other facts are presented on the record, but as they

were not brought to our notice, or relied on in the argument of the plaintiff's counsel, we have not thought it necessary to consider them.

Let the judgment be affirmed.

HARRISON v. TULANE, et al.

1. Where a contract, made with an agent, is sought to be enforced by the principal, or his assignee, and its validity is questioned, on the ground of fraud, the agent may be called as a witness, to prove what were his declarations at the time the contract was made, without showing any proof of the nature or extent of his authority.

Writ of error to the Circuit Court of Shelby county.

ASSUMPSIT on a promissory note, signed by Tulane and Meshaux, payable to one Pitts, and by him assigned to Harrison.

The defendants pleaded *non assumpsit*, and other pleas, on which issues were joined, and submitted to a jury, who returned a verdict for the defendants, on which judgment was rendered.

At the trial, the defendants called a witness, who swore that the note sued on, was given by the defendants to the witness, as the agent of Pitts, the payee, for the right of said Pitts' cotton cultivator, for a certain section of country, and offered to prove by this witness, the declarations made by him to the defendants, at the time of the purchase. The evidence of these declarations was offered for the purpose of showing that a fraud was practised on the defendants at the said purchase.

This witness was asked by the plaintiff's counsel, whether there was not a written power of attorney under which he acted as the agent of Pitts. The witness answered, that there was such a power, but he had left it at his residence. Thereupon the plaintiff objected to this witness stating what declarations were made by him as the agent of Pitts, unless this power of attorney was produced.

This objection was overruled, and the witness allowed to swear to such declarations. The plaintiff excepted; and this matter is now assigned as error.

PECK, for the plaintiff in error, cited Paley on Agency, 235, 245, note d.; Fisher v. Campbell, 9 Porter, 210; Nixon v. Hyseratt, 6 J. R. 58; Gibson v. Colt, 7 ib. 390; Fenn v. Harrison, 3 T. R. 757; Jeffrey v. Bigelow, 13 Wend. 522; Perkins v. Washington, In. Co. 4 Cowen, 659.

CHILTON, *contra*, cited Story on Agency, 126, notes 1, 2; McGill v. Hauffman, 4 S. & R. 317; Phillips' Ev. by C. & H. 168, *et sup.* 180, 604.

GOLDTHWAITE, J.—According to our understanding of this case, the nature or the extent of the agent's authority, was entirely immaterial, and therefore the witness was properly enough allowed to testify to the declarations made by him when the note was given, and which we must presume induced the defendants to give it.

The cases cited by the counsel for the plaintiff in error, only go to prove that the principal is not bound for the unauthorised act of his agent. It is not important to this case to deny such a position, because it is not the condition in which the party stands in connexion with this suit. No attempt is made to charge the principal, but the defendants simply deny that they are bound by this note, because it was procured by fraud.—Whether the agent was invested with authority by the principal to perpetrate it, or whether there was an entire absence of such authority, is immaterial, for the reason that the note is void for such a cause, in either event; and it would be most iniquitous for one, claiming a benefit from the fraudulent act of a person acting as his agent, to say, true it is, a fraud may have been practised, but it was unauthorised by me, and therefore, I will compel the payment of the note which has been taken for my benefit.

The fraud, if it attaches to the security, will vitiate it, and the principal cannot be permitted to disavow the act, as without authority, and immediately reap the benefit of it, as creating a valid contract.

Let the judgment be affirmed.

CATLIN, PEEPLES & Co. v. GILDERS, EX'R & EX'RX.

1. Upon the margin of the judgment entry, the suit was stated against the defendants in the firm name; the process had been served on one of the defendants, and he only pleaded; the judgment recites that the parties came by their attorneys, and the jury were empanelled to try the issue joined—*Held*, that the reasonable inference is, that they only appeared who were parties to the issue tried.
2. Where, in an action on a promissory note, the defendant, by his plea, puts in issue the making of the note, if it is correctly described in the declaration, it should be permitted to be read to the jury, without any additional evidence, that the plaintiff may offer proof of its genuineness, and to show that it is the defendant's act.
3. One of the partners of a firm, when sued upon a promissory note made in the name of the concern, after its dissolution, by another of the late partners, can not, for the purpose of showing that it was not made by his authority, give evidence of what he had said in regard to other notes, made under similar circumstances.
4. It is competent for partners, upon the dissolution of their partnership, to invest each other, or any one of their number, with authority to borrow money, and make notes upon their joint account, in order to pay the debts of the firm; and where such an authority is conferred, the statement of one of them, upon obtaining a loan of money, that it was to be applied in payment of a firm debt, is evidence against the others.
5. The extent to which partners may pledge the responsibility of each other, is not to be determined from the articles of partnership under which they associated, but from the character of their dealings, and the manner in which they hold themselves out to the world.
6. The Court may, with propriety, refuse to permit a defendant, who has offered evidence to the jury, to withdraw the same, and demur to that adduced by the plaintiff.
7. It is not necessary, to entitle the plaintiff to recover, that the proof in his favor should be conclusive; but if the evidence establishes *prima facie*, a good cause of action, it is quite sufficient.
8. Under the common count, upon an account stated, a promissory note is admissible evidence, without any proof of its consideration.

THE testator of the defendants in error, brought an action of assumpsit, in the Circuit Court of Tallapoosa, against the plaintiffs, on a promissory note, of which the following is a copy. "Six months after date, we, or either of us, promise to pay Sinnort Gilder or bearer, the sum of one thousand dollars. for value received, this 14th day of March, 1837.

CATLIN, PEEPLES & Co."

The writ was executed on Peeples only, but the plaintiff de-

clared against him, together with Henry Catlin and John D. Saunders, as surviving partners of Joseph C. Heard. Peeples alone pleaded,

1. That the note was not made by him, nor by any one authorised by him.

2. That he was not a member of the firm of Catlin, Peeples & Co. at the time the note was made, and that it is not his act.

3. *Non assumpsit*.

All of which pleas are verified by affidavit.

Pending the suit, Gilder died, and it was revived in the name of his executor and executrix, and tried by a jury, who returned a verdict in favor of the plaintiffs.

On the trial, the defendant excepted to the ruling of the presiding Judge. From the bill of exceptions, it appears that a witness, offered by the plaintiffs, testified that the note in suit, was signed by Henry Catlin; that Catlin and Peeples, and perhaps other members of the firm, informed him, that the firm was composed of Henry Catlin, Rufus D. Peeples, (the defendant) John D. Saunders and Joseph C. Heard. That this information was given him in 1835, and that he afterwards understood Heard was dead, but when he died, or when the firm was dissolved, witness could not state; and further, that it was an ordinary mercantile concern, dealing in goods, wares and merchandize. Upon this evidence, the plaintiffs offered to read the note to the jury, when the defendant offered a witness to prove, that Heard died before the date of the note, but the Court rejected the evidence, stating that it would be competent for the defendant to offer the witness after the plaintiffs had gone through with their evidence; and that plaintiffs might read their note to the jury. Thereupon the defendant excepted, &c.

The defendant then proved that Joseph C. Heard died about the 15th February, 1837, and offered to prove that Henry Catlin, after the death of Heard, executed new notes in the name of Catlin, Peeples & Co. which notes Peeples had refused to recognize, or pay; to the proof of this latter fact of disaffirmance on the part of Peeples, the plaintiffs objected, and their objection was sustained. Thereupon the defendant excepted, &c.

The defendant having closed his evidence, the plaintiffs introduced a witness, who stated, that Peeples informed him in June, 1837, that the firm of Catlin, Peeples & Co. was dissolv-

ed, as to making new contracts, but the survivors had the right to use the firm name to borrow money to settle old debts, and to settle up its old debts; and that he expected the money Catlin had borrowed from the witness, was obtained for that purpose. The witness further stated, that the plaintiff's testator resided in the neighborhood of the place, where the firm had carried on their mercantile business. To the introduction of this proof, as to the borrowing of money, the making a note to the witness therefor, and the statements of Peeples, the defendant objected; but his objection was overruled; and thereupon he excepted, &c.

The plaintiffs introduced another witness, who testified, that between the 20th of January and the first of February, 1837, he was informed by Henry Catlin, that he had made a contract with one Edwards, a hog-drover, on behalf of the firm of Catlin, Peeples & Co. for the purchase of a number of pork hogs. Witness resided where the firm had done business, and was employed by Catlin to pickle the pork for the firm. Witness, under a written order from Catlin, sold some of the pork for the firm, and in addition, made other sales on behalf of the firm; the remainder of the pork, together with the goods of Catlin, Peeples & Co. on hand, were sold at auction in June, 1837, in the presence of Peeples. The note in suit, was given for money borrowed of Gilder, by Catlin, at or about the time of the loan, the latter stating it was to pay for the pork purchased as aforesaid. The witness further stated, that the firm dealt in dry goods and groceries, traded with the Indians, and were in the habit of trading in any thing on which they could make money; but did not buy lands nor mules, nor did he know of any pork having been purchased by them, except as already stated.— That Catlin, Heard and Saunders were the active co-partners in the firm; that Peeples resided some miles distant, and was not actively engaged in the concern; that he does not know whether the defendant knew any thing about the purchase of the pork, the borrowing of the money, or giving of the note; nor does he know that Peeples ever derived any benefit from the sale of the pork. The pork was purchased before the death of Heard, but the money was borrowed, and the note made after that event. The defendant objected to the evidence as to the purchase of the pork, the borrowing of the money, and the

declarations of Catlin at the time it was borrowed, as to the manner in which it was to be appropriated; it not appearing that Peeples was privy thereto; but the Court overruled the objection, remarking that the plaintiffs had laid a predicate for such evidence, by proving the admission of Peeples, that the survivors had authority to use the firm name to settle its old debts. Thereupon, the defendant excepted, &c.

The plaintiff then introduced another witness, who testified, that in the spring of 1838, she heard a conversation between Saunders and the defendant, in which the former remarked, that he had just received a dun for money due from the firm to old Mr. Catlin, of Wetumpka, and that there was a debt due to old Mr Gilder, for money borrowed, when it could be obtained no where else; that old Mr Gilder was an honest man, and ought to be paid. In reply, the defendant said, "we must do the best we can—it ought to be paid." Here the plaintiff closed his evidence.

The defendant then offered the original articles of co-partnership, by which Catlin, Peeples & Co. became associated in business, and proposed to prove their execution by the subscribing witness; these articles provided for dealing in merchandize, at a place therein designated: he proposed further to show, by proof *aliunde*, that the purchase of pork by any member of the firm, was without the scope of the partnership dealings: All which was rejected, on the ground that the testimony last adduced, was rebutting evidence, in answer to that previously offered by the defendant, and according to the practice of the Court, the introduction of additional proof, was not permissible. Thereupon, the defendant excepted, &c.

The defendant then proposed to withdraw from the jury, the evidence offered by him, and to demur to the plaintiffs evidence, but the Court decided that the plaintiff at this stage of the proceeding, could not be compelled to join in a demurrer—that the defendant could not withdraw his evidence; and the Court would not allow him to do so. And thereupon, the defendant excepted.

The defendant then prayed the Court to instruct the jury,

1. That having denied, on oath, the making of the note in suit, it was incumbent on the plaintiffs to prove his liability, and on failure of such proof, the jury should find for the defen-

dant on the first count, which charge the Court gave with this qualification, that it was necessary for the plaintiffs to make out a *prima facie* case.

2. That the death of one of the partners put an end to the partnership, and if the jury believed from the evidence, that the note mentioned in the first count was executed after the death of one of the firm, without the consent of the defendant, he is not liable thereon; which charge the Court gave, with this qualification, that if the surviving partners consented to the giving of such a note, or had subsequently ratified, or recognized the act, they should find for the plaintiffs; for in such case, the note would be good against the survivors, and void as to the representatives of the deceased partner.

3. That if there was no other consideration than such as was liquidated and settled by the giving of the note in controversy, the plaintiffs must recover on the note, or not at all, unless he has offered to cancel or return it; which charge the Court refused to give, but instructed the jury, that the plaintiffs might give the note in evidence, under the common counts, and recover upon them.

4. That to make the defendant liable for a contract made by Catlin for the purchase of hogs, it was necessary that the plaintiffs should show that the purchase of such stock came within the scope of the partnership dealings of the late firm of Catlin, Peeples & Co. or that it was assented to, by the defendant; which charge the Court refused to give as prayed; but charged, that if the plaintiffs had proved a general partnership, the jury might presume the purchase of hogs was embraced, and if such a partnership had been proved, it was incumbent on the defendant to show, that the purchase of hogs did not come within the scope of its dealings. To the refusal of the Court to charge the jury as prayed, and to the charges given, the defendant, excepted, &c. And judgment was rendered in favor of the plaintiffs against the defendants. The judgment entry recites, that the parties came by their attorneys, and this is the only evidence in the record of the appearance of the defendants not served with process. From the judgment of the Circuit Court, a writ of error is prosecuted to this Court.

BAYLOR, for the plaintiff in error, insisted that the partner-

ship of Catlin, Peeples & Co. was dissolved by the death of Heard, and that the note in suit being made by Catlin, imposed no liability upon the defendant, Peeples; that the evidence adduced to show his assent to the making of the note, and that he derived a benefit from it, was too indirect and indefinite to authorise its admission.

Again, a judgment is rendered against all the parties declared against, though Peeples only was served with process, and appeared. Such a judgment cannot be sustained.

The charges of the Court are not free from objection; and the fourth charge prayed, should have been given. It merely affirms the familiar principle, that a partnership cannot be bound by the act of one of its members, not within the scope of its dealings.

HARRIS, for the defendant. The judgment shows that the parties came by their attorneys, and the presumption is, that all who are declared against, appeared.

The note being made in the partnership name, it will be intended that it was given for a partnership debt. Chitty on Bills, 617; Vallett v. Parker, 6 Wend. Rep. 619.

The admissibility of evidence is to be determined by the Court, its sufficiency by the jury. Clifton v. Grayson, 2 Stewt. Rep. 412; Bell v. Rhea, Conner & Co. 1 Ala. Rep. N. S. 85.

The admission of the defendant's testimony after the plaintiffs had closed their rebutting evidence, was a matter within the discretion of the Court, and consequently, not revisable.—James, *et al.* v. Tait, *et al.* 8 Porter's Rep. 476; Towns v. Riddle, 1 Ala. Rep. N. S. 694; 2 Phillips' Ev. C. & H.'s notes, 712, 717.

The Circuit Court properly refused to compel the plaintiffs to join in a demurrer to the evidence. Alexander v. Fitzpatrick, 4 Porter's Rep. 405.

The note was evidence under the money counts. Hightower v. Ivey, 2 Porter's Rep. 308; Hunley v. Willis, Lang & Co. 5 *ibid.* 154; Gillespie, *et al.* v. Wesson, 7 *ibid.* 454.

The admissions of a partner, though not a party to the suit, is evidence as to joint contracts against any other partner, as well after the determination as during the existence of the partnership. Chitty on Bills, 617.

COLLIER, C. J.—In Gilbert, *et al.* v. Lane, 3 Porter's Rep. 267, the writ issued against several defendants, but was executed upon one only. In the margin of the judgment entry, the names of all the defendants were stated at length, and the judgment recited that the defendants came by their attorney, and say nothing in bar of the plaintiff's action, &c. The Court held that, "the names of all the defendants on the margin of the entry, and the statement in the entry, that the defendants appeared by their attorney, show clearly that the three defendants all appeared in the suit." That case is clearly distinguishable from the case at bar; here, but one of the defendants pleaded, so that as to him only, the case could regularly have been submitted to the jury; and when it is said that the parties came by their attorneys, the reasonable inference is, that they only came, who had made up an issue to be tried by the jury. Had the defendants who had not appeared and pleaded, have attempted to litigate the facts, the Court would doubtless have denied to them the right to do so, if objected to by the plaintiffs, because they had not interposed in a legal form, a denial of the plaintiffs cause of action. This reasoning is not opposed by any thing appearing in the record. The names of the defendants are not set out at length in the margin of the judgment; they are styled as Catlin, Peeples & Co. and the recital in the entry, is not that the defendants came, &c. but that the parties came by their attorneys, and that the jury were empannelled "to try the issue joined," thus excluding the presumption, that the liability of the defendants who were not parties to the issue, were to be determined by the jury. Nor does the verdict assume to charge the defendants; it is a mere finding of the issue in favor of the plaintiffs, and an assessment of their damages; but it is the judgment consequent upon the verdict, which determines they are liable. From what we have said, it follows that the judgment of the Circuit Court is erroneous in having been rendered against defendants, who had neither been served with process nor appeared.

We might here close this opinion, but as other questions of law are raised upon the record, and have been discussed at the bar, it is proper to consider them, that a guide may be furnished for the ulterior action of the Court below.

In respect to the admissibility of the note on which the ac-

tion was brought, there was no necessity for proving it to have been made by the parties declared against, or either of them, before reading it to the jury as evidence ; if it was correctly described in the declaration, the defendant could not be allowed to insist before the Court, that it should be excluded from the jury, because it was not his act. The parties had already joined issue upon that point, and agreed to refer to the jury the examination of the facts, and the first step in the trial, was the production of the note; for until that was before the jury, the plaintiffs could not have introduced their evidence to disprove the defendant's plea. A question very similar in principle, was raised in the case of Bell v. Rhea, Conner & Co. 1 Ala. Rep. N. S. 83. In that case, it appeared that the defendants in error declared on a promissory note, payable to them, by the name of Rhea, Conner & Co. under the plea of *non assumpsit*, it was objected in the Court below, that the note was not admissible evidence, until the plaintiffs proved that they were the individuals composing the firm, to whom the note was payable, but the objection was overruled, and the question here made, was, whether the note had been properly admitted. This Court say, "the note was properly described in the declaration, and clearly tended to prove a very material part of the plaintiffs case ; it was the first and indispensable link in the chain of evidence, which was to establish his case; and being excluded, no matter how just his demand, he could not have recovered." Further, "the true rule seems to be where the evidence is unobjectionable in itself, and tends to prove a material fact in issue, it should be allowed to go the jury, who are the proper judges of the effect to be given to it. No inconvenience can result from this rule, in practice, since the Court can always instruct the jury as to the sufficiency of evidence." To the same effect is Emerson and another v. The Providence Hat Man. Co. 12 Mass. Rep. 237, 244. These cases are conclusive to show, that the Circuit Court very properly rejected the evidence, by which the defendant proposed to show *to the Court* that the note declared on, was not made by him, or his authority ; and that the permission of the plaintiffs to place it before the jury, even without additional evidence, would have been regular.

As a general rule, a party cannot give evidence of his decla-

rations for the purpose of establishing a demand in his favor, or to resist a recovery against himself. The application of this principle, to the offer of the defendant to prove that he had refused to recognize or pay some notes made by Catlin, in the name of Catlin, Peeples & Co. after the death of Heard, shows that such evidence was inadmissible.

Although the death of Heard, *ipso facto*, dissolved the partnership of Catlin, Peeples & Co, yet it was competent for the survivors to invest each other, or any one of their number, with authority to borrow money, and make notes upon their joint account, in order to pay the debts of the firm. And it was permissible for the plaintiffs to show that the defendant recognized the authority of the other surviving partners, thus to pledge his responsibility, by proof of his admissions or declarations to that effect. If the survivors conferred such an authority upon each other, the statement of one of them upon obtaining a loan of money, that it was to be applied in payment of the firm debts, would be evidence against the others. This is implied from the nature of the power granted, which makes each the agent of the other for a defined and specific purpose, but as it respects third persons who may lend money, they are agents for the purpose of borrowing generally; otherwise the lender for his own protection would be compelled to look to the application of the loan—an idea which cannot be tolerated.

The purpose for which a partnership was created, and the extent of the authority of the individual members, is not to be limited by the articles, under which their connection was formed, but is to be ascertained, rather from the character of their dealings, and the manner in which they hold themselves out to the world. In respect to the firm of Catlin, Peeples & Co. one witness says they dealt in dry goods and groceries, and were in the habit of trading in any thing on which they could make money. Taking this statement as literally true, and it cannot be questioned, that Catlin might, during the continuance of the partnership, have purchased hogs or other stock, on account of the firm. Conceding that the Court had no discretion as to admitting or rejecting the evidence offered after the plaintiffs had closed their testimony in answer to the defendant, yet from what we have said it is apparent that the defendant was not prejudiced by the exclusion of the articles of partnership—

these operated *inter partes*, but could not override the effect of their general course of dealing, so far as the plaintiffs were concerned.

The refusal of the Circuit Court to permit the defendant to withdraw from the jury, the evidence he had offered, and to demur to that adduced by the plaintiffs, was certainly correct. A party who has offered evidence to the jury, cannot be permitted to demur to the facts which his adversary has proved: *Young v. Black*, 7 Cranch's Rep. 565; *Pawling, and others v. The United States*, 4 Cranch's Rep. 219; *Pharr & Beck v. Bachelor*, at June Term, '41. And a Court could not, with a just respect for the administration of the laws, permit a party to speculate upon the chances of success, by first offering evidence to the jury, and then, when he has ascertained it to be unsafe to entrust his case to them, to ask leave to withdraw his evidence, that he may submit to the decision of the Court.

In regard to the charges prayed, and refused, or given to the jury, we will consider them in the order in which they are stated in the bill of exceptions. The Court gave the first, as asked, that is, it instructed the jury, that the plaintiffs must show the defendant's liability to pay the note sued on, qualifying the charge, with the remark, that the proof need not be conclusive, but that it was necessary for the plaintiffs to make out their case, by showing, *prima facie* a right to recover. The Court gave the second charge prayed, affirming that the death of Heard, operated a dissolution of the partnership of Catlin, Peeples, & Co. and that if the note in suit, was executed after such dissolution, without defendant's consent, he is not liable. But in addition, the Court say if the surviving partners consented to the giving of such note or ratified or recognized the act, they should find for the plaintiffs; for in such case the note would be good against the survivors, and void as to the representatives of the deceased partner. The correctness of the qualification of the first charge is too plain for argument, and the addition to the second, has, in the view taken of another part of the case, been shown to be in conformity to law.

The third charge asked, supposes, that a promissory note is not evidence under a count upon an account stated, but to entitle the plaintiffs to recover, under such a declaration, the consideration of the note must be shown. This charge was pro-

perly refused, and the note held to be sufficient evidence in itself. Authorities are ample to show, that the law requires no other evidence than the note itself: Chitty on Bills, 9 Am. ed. 596; Hunley v. Willis, Lang & Co. 5 Porter's Rep. 154; Gilaspie, *et al.* v. Wesson, 7 *ibid* 454.

But the fourth charge prayed, should have been given. It was a request of the Court to declare a well settled principle in the law of partnership, viz: that partners are not liable for each others acts, to a greater extent, than they appear by their general course of dealing to have authorised. Under the state of the pleadings, such an instruction was proper, and being so, the defendant was entitled to have it given, in the terms in which it was asked. If the Court supposed, that a charge thus general, was calculated to mislead, or embarrass the jury, its effect and meaning could have been explained. It is unnecessary to consider the last instruction given, for conceding it to have been correct, it can't cure the error of the refusal to charge as asked.

This view disposes of the case as presented, and the consequence is, the judgment is reversed, and the cause remanded.

THE STATE V. PRIMROSE.

1. A person who removed to the territory of Louisiana after the treaty of Paris, in 1803, and before its admission into the Union as a State, and was an inhabitant thereof from the time of his removal until after the adoption of the State Constitution, and its admission into the Union, does not thereby become a citizen of the United States.

On points novel and difficult, from the Circuit Court of Mobile.

THE defendant was indicted in the Court below, for a libel, and pleaded in abatement, that one of the grand jurors, by whom the bill of indictment was found, was not a citizen of the United States, but was an alien, and a subject of the Queen

of Great Britain. Issue being taken on the plea, it appeared in evidence, that the juror was born in Ireland, and came to the United States, in the year one thousand eight hundred and nine, being then over the age of twenty-one, and came to Louisiana, in the year one thousand eight hundred and eleven, and remained there, until the year one thousand eight hundred and fourteen, at which time he came to Mobile, in the now State of Alabama, where he has lived ever since; and there being no proof that said juror had ever been naturalized, under any act of Congress, or in any other manner than as above stated, the Court directed the jury to find the issue for the State; but considering the question novel and difficult, reserved it for the revision of this Court.

ATTORNEY GENERAL, for the State.

CAMPBELL, contra.

ORMOND, J.—The question to be determined is, whether the fact, that a person was an inhabitant of the Territory of Louisiana, previous to its admission into the Union, by virtue of the act of Congress of the 20th February, 1811, will constitute such person a citizen of the United States. This act, which was to enable “the people of the Territory of Orleans to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States,” authorizes the “*inhabitants*” of the Territory to form for themselves a constitution and State government, &c.

As the citizenship of the juror, is supposed to flow from his being an *inhabitant* of the Territory of Louisiana, at the time of the passage of the act of Congress of 1811, previously cited, it becomes necessary to consider the precise import of a term, from which such consequences are to arise. By the term, *inhabitant* of a place, or country, we understand one who has his domicil, or fixed residence there, in opposition to one who is a mere sojourner or temporarily resident in the place, or country: Bouviere’s Law Dic. 504; 1 Dall. 480. It by no means however, follows, that an inhabitant is a subject or citizen; a foreigner, permanently resident, is as much an inhabitant, as if he were a citizen, or subject.

By the term, *inhabitants*, therefore, in this act, was merely meant the mass, constituting the body politic, who were authorized to form a State constitution, preparatory to admission into the Union. It certainly was not the intention of Congress, either in this, or in any of the other acts for the admission of new States into the Union, to do more than to prescribe the terms on which such State might be admitted. That it was not intended by the act, to confer citizenship, is conclusively shown by the 2d section of the act prescribing the qualifications of the voters for representatives to the convention, which was to form the State constitution. They were required to be, free white male citizens of the United States, having resided one year in the Territory, and paid taxes. Now, if the intention had been, that by the admission of the State into the Union, all the *inhabitants* became citizens of the United States, there would have been no propriety whatever, in confining the elective franchise to those who were *then* citizens.

The act for the admission of Louisiana into the Union, does not differ in any important particular from any of the other acts of Congress, passed for the same purpose, before and since. The act for the admission of Alabama into the Union, is precisely similar, and if the pretension set up, is well founded, as the juror was an inhabitant of Alabama, before, and at the time of its admission into the Union, there would be no necessity to resort to his residence in Louisiana, to establish his citizenship, unless the fact, that the Territory, constituting the State of Louisiana, was acquired by cession, since the formation of the Federal government, affects the question. But we apprehend, that the utmost which could be claimed for the residents of States thus circumstanced, would be, that they should be placed on the same footing with those residing in States, formed from the public domain, which belonged to the States at the formation of the Federal compact.

It is probable that the decision of the Court below, was made on the supposition, that the treaty of 1803, generally called the treaty of Paris, by which Louisiana was acquired, conferred citizenship on the juror. The 3d article of the treaty, provides, "that the inhabitants of the ceded Territory, shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the Federal con-

stitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess: 1 vol. Land Laws, U. S. 43.

There can be no doubt that all persons, who at the date of the treaty were "inhabitants" of the ceded territory, that is, who permanently resided there, were by the operation of the treaty itself, created citizens of the United States, and they are by the act of Congress of 1811, considered as citizens. But it is impossible to suppose that the French government, in making this stipulation on behalf of the inhabitants of the country they were ceding, or the United States, in acceding to it, intended to embrace those persons who might become inhabitants of the ceded Territory, at any after period.

We have been informed that a different decision has been made by the Courts of Louisiana from the conclusion here attained. We have not seen the report of the case, and do not know whether the facts are the same as in this case, or by what reasons the decision is fortified: it cannot therefore influence our judgment.

In our opinion, the Court erred in its charge to the jury, and its judgment is therefore reversed, and the cause remanded.

MOORE v. BRADFORD.

1. When no special venue is disclosed in an action on a bill of exchange, the place of drawing will be inferred, on demurrer, to be that stated in the margin of the declaration.
2. When a verdict is found, the correctness of its amount can not be enquired into upon a writ of error.
3. Inland bills of exchange carry damages, when protested for non-acceptance, by virtue of the statutes.
4. The entering of a *nolle prosequi* to the last count of a declaration, does not carry with it the breach of the contract, which is assigned at the end of the declaration.

Writ of error to the Circuit Court of Talladega.

ASSUMPSIT by the indorsee, against the drawer of a bill of exchange, for 6100 dollars. The declaration contained two counts; the first, alleging the non-acceptance of the bill, protest and notice; and the second, the non-payment, as well as the non-acceptance with averments of protest and notice. Each count was demurred to, and after demurrer, the plaintiff entered a *nolle prosequi* as to the second count. The first count alleges, no special venue as the place where the bill was drawn, but after stating its date, avers, that the defendant *then* and *there*, drew his bill of exchange. The county of Talladega, is mentioned in the margin of the declaration. The bill is drawn on a commercial firm in the city of Mobile, and the allegations of the Court show a presentment for acceptance, refusal, protest and notice to the defendant. In stating the liability of the defendant for damages, it avers that by the usage and customs of merchants, the defendant became liable, &c.

The Court overruled the demurrer, and the cause was submitted to a jury, which returned a verdict for the plaintiff, on which judgment was given.

The defendant prosecutes his writ of error and insists here,

1. The demurrer ought to have been sustained.
2. That by entering the *nolle prosequi*, as to the second count, no sufficient breach of the contract remained in the declaration.

3. That judgment was rendered for damages when none were allowed by law.

W. B. MARTIN, for the plaintiff in error.

CHILTON, contra.

GOLDTHWAITE, J.—1. The chief objection to this declaration, is that it does not sufficiently appear where this bill of exchange was drawn, so as to enable the Court to determine whether it is inland or foreign, which the plaintiff in error insists is necessary, as the statute gives a different rule for damages in either case. This is a matter which cannot well become a question on demurrer, as the bill will be presumed to be drawn at the place stated as the venue of the declaration, and is therefore shown to be an inland bill.

2 and 3. The cause having been determined upon an issue, the amount of the verdict cannot be questioned on error: *Moore v. Coolidge*, 1 Porter, 280; but if it could, we have no doubt that damages are allowed by our statutes upon the protest of an inland bill of exchange for non-acceptance: Aik. Dig. 328, § 5.

4. The *nolle prosequi* upon a second count, did not so operate as to strike out the breach of the contract, even if that is to be considered as attached to that count, instead of applying equally to both.

The judgment is affirmed.

PUCKETT V. POPE.

1. The defendant being sued on the exemplification of a judgment, rendered in the State of Mississippi, pleaded that he was not a citizen of Mississippi; was not there at any time pending the suit, nor was he notified of its pendency by the service of process or otherwise, and that he did not appear to, or defend the same, either personally, by attorney or otherwise--*Held*, that the plea was not bad on demurrer, that if there was any thing in the record which would estop the defendant from interposing such a plea, it should have been replied.
2. Where there are two defendants, only one of whom is served with process, and pleads, and the judgment entry recites that the parties came by their attorneys, and thereupon came a jury &c. it will be intended that they only came who had made up issue to be tried by jury.
3. When the plaintiff's demurer to several pleas of the defendant is overruled generally, with leave to reply, which is declined, the judgment on demurrer will not be reversed if either of the pleas is good.
4. Where a judgment final, was rendered for the plaintiff on demurrer to several pleas in bar, such a judgment put an end to the suit, and if the cause is afterwards tried on the *general issue*, the judgment will not be reversed for an error in the exclusion of evidence.

Writ of error to the County Court of Madison.

THE plaintiff in error, declared against the defendant in debt upon the exemplification of a judgment alledged to have been recovered against him and one Benjamin G. Sims, as partners, in the Circuit Court of Hinds county, in the State of Mississippi.

The defendant pleaded,

1. *Nul tiel* record.
2. That no writ, or other process in the suit mentioned in the plaintiff's declaration was ever served or executed on him, nor was he ever notified in any manner, of the pendency of the same, or of the supposed recovery therein; and that he never appeared to or defended the said suit either personally, or by attorney, or otherwise.
3. In addition to a denial of notice of the pendency of the suit, or an appearance to the same, as in the second plea, the defendant pleads that he was a citizen of the State of Alabama, residing and personally being therein, at and before the commencement of the suit in Mississippi, and during its pendency,

and still is, without ever being within the jurisdiction of the Circuit Court of Hinds county, or within the State of Mississippi, from the time the suit was brought, to its conclusion.

4. In addition to the facts stated in the third plea, the defendant avers, that it does not appear by the record of the suit described in plaintiff's declaration, that he was ever in any manner notified of the same, or that he ever appeared to or defended it.

In addition to the facts alleged in the fourth plea, the defendant pleads that he was not, when the suit was commenced, in Hinds county, in the State of Mississippi, or at any time afterwards a partner of Benjamin G. Sims, who is mentioned in the plaintiff's declaration.

6. After recapitulating the matter of the fifth plea, it is alleged that the plaintiff commenced and prosecuted his suit in Hinds county, Mississippi, and obtained a recovery therein against the defendant, fraudulently, well knowing that he was not a partner of Sims, at the time of the commencement, or during the pendency of the same.

The plaintiff demurred to each of the defendant's pleas, except the first, and on that issue was taken to the Court. The questions of law, arising upon the demurrer being argued, the demurrer was overruled and leave given to the plaintiff to reply, which he declined doing. Upon the trial of the issue of *nul tiel record*, the Court rejected the exemplification as evidence, and thereupon, the plaintiff excepted.

The process or writ, which makes part of the exemplification, appears to have been served on Sims alone, and is returned, "not found" as to Pope. Sims alone pleaded, but in the margin of the judgment entry, the parties names are thus stated: "Jesse Puckett v. Sims & Pope," and the entry proceeds, "This day, came the parties by attornies, and thereupon came a jury to wit" &c.

ROBINSON, for the plaintiff in error—insisted, that the demurrer to the defendant's pleas, should have been sustained, on the ground, that they assumed to contradict a record. The case of *Mills v. Duryee*, 7 Cranch's Rep. had settled that the record of a judgment recovered in one State, was conclusive as evidence, when sought to be enforced by action in another; and,

this case has been recognized as authority, not only in this, but in all the other States.

The judgment in Mississippi, recites that the parties came by attorneys, and this shows, that the defendant appeared to the suit there, although he may not have been served with process.

But conceding that the demurrer was rightfully sustained, and then the Court erred in rejecting the exemplification, under the plea of *nul tiel record*.

HOPKINS, for the defendant. The case of *Mills v. Duryee* has certainly been followed as a correct exposition of the law, yet it has been frequently holden, that a defendant when sued in one State, upon a judgment recovered in another, may plead that he had no notice of the pendency of the suit—that he did not reside in, nor was temporarily in the State where the recovery was had, pending the action; or any other matter showing a want of jurisdiction: 1 Johns. Rep. 424; 5 Johns. Rep. 40; 9 Mass. Rep. 467. And the recital in the exemplification, of the defendant's having had notice of the suit, or appeared thereto, will not estop him from denying the want of jurisdiction, in the Court rendering the judgment: 13 Johns. Rep. 206; 2 Hall's Sup. C. Rep. 302; 6 Wend. Rep. 447; 4 Cow. Rep. 292; *Lucas v. The Bank of Darien*, 2 Stewart's Rep. 280.

But the exemplification from Mississippi, shows that the defendant was not served with process, and the recital in the judgment is no evidence of his having appeared: 1 Howard's Rep. 358.

The decision on the plea of *nul tiel record* was unnecessary, the defendant being entitled to judgment on his other pleas; and although the record may have been properly described in the declaration, and regularly authenticated, its rejection was not an error of which the plaintiff can complain.

COLLIER, C. J.—There is great contrariety of decision, upon the question, whether a defendant against whom a judgment has been rendered in one State, can, when sued in another, plead that he was not amenable to the jurisdiction of the Court, rendering the judgment, where the exemplification of the recovery shows, that he appeared to the suit, either in person, or by attorney: 3 Phil. Ev. C. & H's ed. 799, 800, 801, 908.

909, and cases collected and commented on. *Thompson v. Tolmie*, 2 Peters' Rep. 165. But it is conceded by all the authorities, that where the defendant does not reside in the State where the suit is brought, and is not served with process, and does not appear, the judgment or decree in such suit, will not be allowed to operate in *personam* against such party in the Courts of any other State: 3 Ph. Ev. 922 C. & H's notes and cases there cited.

A citizen of one State, who comes within the territory of another, contracts a temporary allegiance to it, and may be subjected to the process of its Courts, and bound personally by a judgment there rendered. But whether jurisdiction be acquired in virtue of the service of process on the person, or the seizure of the defendant's property may very materially affect the extent to which the judgment will operate. In order to make the judgment binding upon the defendant *in personam*, he must be served personally, with a notice of the suit while he is within the jurisdiction of the sovereignty under which the Court acts; unless by his appearance he has dispensed with the service of process. But where a judgment is obtained upon an attachment of the defendants property, it will not be regarded in other States as evidence, or as operative *in personam*; for the reason, that except so far as the property attached is concerned, there is, and can be no jurisdiction or power of adjudication: 3 Phil. Ev. 907, '8, C. & H's notes. Whether the law is not otherwise, where the defendant has notice of the attachment, we need not not inquire.

The law being as we have stated it, it was clearly competent for the defendant, unless estopped by the record, to deny by plea, that he was a citizen of the State of Mississippi, that he was there at any time pending the suit, that he was notified of its pendency, by the service of process, or otherwise, and that he did appear to, or defend the suit, either personally, by attorney or otherwise. Such, in substance, was his second plea. And if the plaintiff had relied upon the record as an estoppel, he should have replied speccially, setting out, or substantially reciting such parts of it, as went to negative the plea. In the absence of a replication of this kind, the County Court could not have undertaken to say, that the second plea was bad. It was enough for the defendant to place upon the

record a defence which was *prima facie* available, without denying in advance, every supposable fact by which it might be avoided: according to the rules of pleadings, such matters in avoidance must have been alleged by the plaintiff.

We will not, as the decision of this case does not require it, consider whether the recitals in a record, of the service of process, or the appearance of a defendant, shall be conclusive against him. That question we have seen, being one on which the cases are by no means harmonious, we prefer to place our judgment upon ground less disputable, and have no hesitation in concluding, that upon considering the demurrer to the pleas, the exemplification was not before the Court, except so far as it was described in the declaration. The declaration is in usual form, merely reciting the recovery of the judgment in Mississippi, its non-payment, &c. but is entirely silent upon the point, whether the defendant had notice of, or appeared to the suit there.

But the plaintiff would not be benefitted, even if it were permissible, in considering the pleas demurred to, to refer to the exemplification which accompanies the record in this cause. Although the writ issued against the defendant Sims, yet it is returned "not found" as to the former, and although the names of the parties are stated in the margin of the entry, as "Puckett v. Sims & Pope," yet the judgment proceeds: "This day, came the parties by attornies, and thereupon came a jury, to wit," &c. In *Gilbert, et al. v. Lane*, 3 Porter's Rep. 267, and in *Wheeler, et al. v. Bullard*, 6 Porter's Rep. 352, the judgments were by *nil dicit*, and recited that the defendants came by attorney, and we held it inferrible, from the recital in the entry, that all the defendants whose names were stated in the margin, were before the Court. But in the case at bar, the entry recites that the parties came by their attornies; that the jury tried the issue joined, and found a verdict in favor of the plaintiff; and "the reasonable inference is, that they only came, who had made up an issue to be tried by the jury." Such was the decision of this Court in *Catlin, Peeples & Co. v. Gilder's executor and executrix*, at this term. This being the law, as applicable to the case before us, it is clear, that there is nothing in the transcript from Mississippi, to estop the defendant from

denying his amenability to the Court of that State, which rendered the judgment against him.

In considering the pleas demurred to, we have not inquired whether they are all good; such an inquiry is unnecessary, as it is enough if one of these pleas presents an available defence; and the second plea at least, is unobjectionable.

In respect to the exclusion of the exemplification, under the plea of *nul tiel record*, it may be said, that the trial of the issue upon that plea, was wholly unnecessary, and in fact, irregular. The plaintiff, upon leave being given him to reply to the pleas to which his demurrer was sustained, declined doing so, and the proper course was to consider the truth of the pleas as admitted, and have rendered judgment for the defendant. No possible injury could have resulted from the exclusion of the exemplification, under the circumstances, and the plaintiff cannot be allowed to allege it as error.

This view is decisive to show that the judgment must be affirmed.

ARTHUR & CORPREW V. BROADNAX.

1. A married woman, whose husband has abjured the State, and who since that event has traded as a *feme sole*, and taken notes in her own name, may sue for and recover the amount.
2. The filing of a plea is an admission that a declaration was filed, although it may not appear in the record.

Error to the County Court of Chambers.

THIS action was commenced before a justice of the peace, by the defendant in error, and judgment having been rendered in her favor, was carried by the plaintiffs in error to the County Court of Chambers, where the plaintiffs in error pleaded that the plaintiff below was a *feme covert*, to which she replied that her husband had abjured the realm before the note on which the action is founded, was given, and has ever since re-

maintained abroad. Issue being joined thereon, and the cause submitted to a jury, the Court charged them, that if they believed the reputed husband of the plaintiff had abjured the realm before the note was given, and has ever since remained abroad, and that plaintiff has ever since traded as a *feme sole*, and that the note sued on was given to her as such, the defendants cannot take advantage of the fact of coverture, they having by their own act recognized her as a *feme sole*, and if they could do so, reputation of their once having lived together as man and wife, is not sufficient to establish the fact of marriage, without the production of the record. To which charge the defendants excepted. The jury found a verdict, and the Court rendered judgment for the plaintiff, from which the defendants prosecute this writ of error. The assignments of error are,

1. The want of a declaration or statement.
2. The submission of the cause to the jury, without pleading, the demand being above twenty dollars.
3. In charging the jury as set forth in the bill of exceptions.

PECK & CLARKE, for plaintiff in error.

ORMOND, J.—In the case of *Wheeler v. Bullard*, 6th Porter, 352, we held, that by pleading to the action, the defendant admitted that a declaration was filed. This has been repeatedly held since that decision was made, and disposes of the first and second assignments of error; as it appears from the record, that the defendant appeared and pleaded to the action.

The answer to the plea of coverture made by the plaintiff, is that her husband had abjured the State before the note was given. The Court in its charge to the jury, inform them, that if they find such to be the fact, and that the husband still remains abroad; that the plaintiff has always since, traded as a *feme sole*, and that the note sued on was given to her as such, they must find for the plaintiff.

This was a correct exposition of the law. See 1 Bacon, Ab. 504. In *De Guillon v. L'Aigle*, 2 Bos. & Pul. 357, it was held, that where the husband resided abroad, and the wife traded and obtained credit, as a *feme sole*, she was liable for her own debts. The same decision was made in the case of *Gregory*

v. Paul's ex'r. 15 Mass. 31. See also, Marsh v. Hutchinson, 1 Bos. & P. 226.

No question is raised upon the record, as to what facts are necessary to constitute abjuration from the State, and we must therefore presume that it was proved to the satisfaction of the Court and jury.

The Court also charged the jury, that the fact of marriage could not be proved but by the production of the record, and would not be established by proof of the parties having lived together as man and wife. This is certainly not the law. The general, perhaps the universal rule is, that the fact of marriage may be proved by general reputation and cohabitation, except in an action for criminal conversation, or on a trial for bigamy, and even in these cases, the fact might be proved by a witness who was present at the marriage.

But this portion of the charge, though erroneous, was wholly abstract, and could not, by possibility, prejudice the plaintiffs in error. The fact of the marriage was distinctly admitted by the pleadings, and not only was it unnecessary for the plaintiffs in error to prove the marriage, but the defendant in error was precluded by her admission in the replication to the plea from disproving it. As, therefore, this charge, though wrong, could neither injure the plaintiffs in error, nor benefit the defendant; it will, according to the established rule of this Court be disregarded.

Let the judgment of the Court below be affirmed.

MORRIS v. ELLIS.

1. Lands of the debtor, within the county, are bound by the rendition of a judgment, and not merely from the teste of the execution, or the time of its receipt by the sheriff.

Writ of error to the Circuit Court of Tallapoosa county.

THIS was an agreed case between the parties, upon the following statement of facts.:

"Several executions upon judgments obtained at the same term, were placed in the hands of the sheriff against the administrators of E. McLemore, and among them, one in favor of the plaintiff, Morris. Some of the executions were of a later date than others; among the older class is that of the plaintiff, and a levy and sale of certain real estate, was effected, but not enough money was made to satisfy the executions of the older date. An apportionment of the money made between the elder executions, will give to the plaintiff one hundred and eleven dollars, but, if apportioned to all, his share will be only sixty-seven dollars. The agreement is, that if judgments in a Court of record in this State, bind real property, then the plaintiff is to have judgment for the last named sum, and if such judgments do not bind real estate, then the plaintiff is to have judgment for the first named sum.

The Circuit Court decided that judgments of a Court of record in this State, do bind real property, and gave judgment for sixty-seven dollars only.

The plaintiff prosecutes his writ of error, and insists that this judgment is erroneous.

HEYDENFELDT, for the plaintiff in error.

THO'S CLAY, contra.

GOLDTHWAITE, J.—There always is some difficulty in reasoning upon a subject, which, by a concurrence of opinion among the profession, has long been considered as settled, with-

out adverting to truisms familiar to all, and stated in every elementary treatise.

In order, therefore, to introduce the subject matter of this opinion, without going back to an inconveniently remote period, we will assume that lands, by the common law, were not bound by a judgment, nor subject, in any manner, to an execution.—This assumption will confine our examination to statutes passed by the legislative authorities of our own State, and from them we shall endeavor to trace the creation and progress of the right and means to subject real estate to the payment of debts.

The first enactment is the act 1807, and this gives the writs of *fiery facias*, *elegit* and *capias ad satisfaciendum*, against the goods, the lands, and the body of the defendant. After setting out the form of these writs, and directing the form and manner of their returns, the statute proceeds, with some specific directions, which tend to explain whatever is doubtful, from the writs themselves. The several sections will be separately examined, so far only, however, as may be necessary to elucidate the subject.

The writ of *elegit*, when issued pursuant to the statute, recites the recovery of the judgment, and the plaintiff's election of that mode of execution; it then commands the sheriff, that he cause to be delivered, all the goods and chattels of the defendant, saving the oxen and beasts of the plough; and also a moiety of all his lands and tenements, in the county whereof, he, at the day of obtaining the judgment, was seised, or at any time afterwards, by reasonable price and extent; to have and to hold the said goods and chattels, to him, the said plaintiff, as his own proper goods and chattels; and the said moiety as his freehold, to him and his assigns, until he shall have levied thereof, the debt and damages. It also commanded the sheriff to certify, under his own seal, and the seals of those by whose oath he should make the extent and appraisement, how he should execute the writ. The manner of the inquisition and appraisement is indicated, though somewhat imperfectly, in the return prescribed. From that it appears that a jury was to be sworn, who ascertained what goods and chattels the defendant was possessed of on the day of the caption of the inquisition, which goods and chattels were then delivered to the

plaintiff; but as to the lands and tenements, the inquisition extended back to the time of rendering the judgment, as well as to those of which the defendant was seised at the time of the inquisition. Aikin's Digest, 157, § 1.

Another section of the same act, is very distinct in its expressions, and confirms the impression induced by the terms of the writ; by this it is provided, that when any judgment or recognizance shall be extended, the same shall not be avoided or delayed, by occasion that any part of the lands or tenements extendable, are or shall be omitted out of such extent; saving always to the party or parties, where lands shall be extended, his, her, or their heirs, executors and assigns, his or their remedy for contribution against such person or persons, whose lands are or shall be omitted out of such extent, from time to time. *Ib.* 160, § 4.

Thus very clearly providing a remedy for one purchaser, whose purchase from the defendant, subsequent to the judgment, shall be overreached by the *elegit* against any other who stand in the same condition, but against whose lands the creditor should not have proceeded.

It will be remembered, that although the form of the writ of *elegit* seems to contemplate that goods and chattels, as well as the lands, should be bound from the time of the judgment, yet the return evidently contemplates that the inquest shall, as to the goods and chattels, only relate to the day of its caption. It would be useless to attempt to account for this apparent discrepancy, as the doubt which might arise from it, is completely settled by a subsequent section of the act, which provides that no writ of *fiери facias*, or other writ of execution, shall bind the property of the goods against which such writ is sued forth, but from the time it shall be delivered to the sheriff, &c. to be executed.

When these enactments are considered, it does not admit of doubt, but that the lands of the debtor, within his county, were bound from the rendition of a judgment, and could be extended by the writ of *elegit*, so as to invest the creditor with a title to one moiety.

The law remained thus until the act of 1812, which provides, that thereafter, lands, tenements and hereditaments, shall be subject to the payment of all judgments or decrees of any

Court of record within the State; and the clerks were directed to frame the executions accordingly. Aikin's Digest, 163, § 18.

Since then, the universal custom has been, to insert the words, "lands and tenements," as well as "goods and chattels," in the ordinary writ of *fieri facias*.

It is apparent, that the act of 1812 did not repeal that of 1807, which gives the writ of *elegit*; and as the lands were then bound by judgment, to the extent which has been shewn, it was useless, in the subsequent enactment, to declare that the lands should be bound from the rendition of the judgment. If a rule different from that applicable to the *elegit*, had been intended to prevail, it doubtless would have been declared by the statute.

It is from these statutes that we arrive at the conclusion that lands, in the county where the judgment is rendered, are subject from the time of the rendition of the judgment.

We limit our decision in the manner which will be observed, not that we wish to be understood as having come to the conclusion that other lands are not bound, but to indicate that to be yet an open question.

We might also add, if authority was necessary to support decisions on our own local statutes, that the enactment of 1807, is understood by us to be in substance, the same as the English act of Parliament, usually known as the statute of Westminster the second; and also, that it is understood to prevail in other States where similar decisions have been had. *Den v. Hall*, 1 Hayw. 72; *Serba v. Deanes*, 1 Brock. 166.

We do not care to dismiss this case without observing that we have merely responded to the question agreed on by the parties, but we do not see how that question could arise on executions against an administrator. That, however, is not a matter of examination on this record.

Let the judgment be affirmed.

CHILD, HIBBLER & PEARSON v. WOFFORD.

1. The defendant addressed a letter to C, (one of the plaintiffs) at the city of Mobile, requesting him to send him goods according to a bill annexed: C and his co-plaintiffs were doing business as partners and commission merchants in the city of Mobile, and not otherwise, and the defendant resided in the interior, about two hundred miles distant. The plaintiffs sent the goods, but without a bill of lading or letter; the agent of the defendant, as well as his principal supposing, that they were sent by C individually, and that to him alone the defendant was accountable—*Held*, that the plaintiffs were entitled to recover in an action for goods sold and delivered.

THE plaintiffs in error, brought an action of assumpsit against the defendant, in the County Court of Pickens, and declared for goods, wares and merchandize sold and delivered, money paid, &c. The case was tried on the pleas of *non assumpsit*, payment, and set off.

On the trial, the plaintiffs excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiffs offered as evidence, a letter written by the defendant to the plaintiff, Child, and addressed to him at Mobile, which letter is as follows:

“CARROLTON, February 8, 1840.

Dear Sir: Please send me the following bill of groceries, as hereby annexed, and I will settle with you when called on, for the same, to wit: one barrel sugar, one barrel best Irish potatoes, one good cheese, one barrel rectified whiskey, 1 barrel rice, 1 box sperm candles, good, fifty pounds white loaf sugar, and one bag coffee.

P. S.—You will please fill the above and send them immediately, if possible, as I am in great need of them.

Yours respectfully,

ISAAC WOFFORD.”

The plaintiffs then proved the amount of the groceries, their value and delivery to the defendant, and that they were paid for with the funds of the plaintiffs, whom it was shown were commission merchants, doing business in Mobile, and known to be thus associated.

Defendant then offered a witness, who stated that he was the

agent of the defendant in writing the letter to Child; that at the time of writing the letter and receiving the goods, Child was indebted to the defendant, who stated that he believed he had no other way of collecting his debt than by ordering goods from Child, and that his object in writing to Child alone, was to become liable to him individually, for such as he might send; and he did not wish to become the debtor of the plaintiffs. These declarations of the defendant were made at the time the letter was written.

The witness further stated, that he received the goods ordered, as the agent of the defendant, believing they had been sent by Child, as no bill of lading accompanied them; that had he have known they had been sent by the plaintiffs, he would not have received them, as the defendant did not intend to become indebted to them. And the defendant believed when he received the goods, that they had been sent to him by *Child alone*.—To the admission of so much of the evidence as related to the defendant's intentions in writing the letter, and his belief on receiving the goods, the plaintiffs objected, but their objection was overruled by the Court, and the evidence allowed to go to the jury; thereupon the plaintiffs excepted.

The Court charged the jury, that if the defendant intended, by writing the letter to Child, to become liable to him alone, should he send the goods ordered, and under the impression that they had been thus sent, he received them, they should find for the defendant. That such was the law, although the plaintiffs had paid for the goods from their joint means, and forwarded them in consequence of the letter to Child.

The plaintiffs counsel prayed the Court to charge the jury, that although the defendant might have believed on receiving the goods, that he was liable to pay Child individually, for the same, yet if the plaintiffs were ignorant of the defendant's intention to make a debt with Child alone, and had paid for the goods from the partnership funds, they were entitled to recover; which charge the Court refused to give. Thereupon the plaintiffs excepted, and a verdict being found in favor of the defendant, and judgment thereon rendered, the plaintiffs have prosecuted a writ of error to this Court.

CRABB & COCHRAN, for the plaintiffs, submitted the case to the Court.

B. F. PORTER, for the defendant, insisted, that the defendant had made no contract with the plaintiffs, and that Child alone could maintain an action. He cited *Tucker v. Wood*, 12 Johns. Rep. 190; *Bruce v. Pearson*, 3 *ibid.* 534; *Tuttle v. Love*, 7 *ibid.* 470; *Chitty on Con.* 9; 3 Johns. Rep. 653; 1 *Caine's Rep.* 584; 5 *East's Rep.* 16.

COLLIER, C. J.—There can be no doubt that the declarations of a party are sometimes evidence in his favor, as constituting a part of the *res gestæ*; but to be a part of the *res gestæ*, the declarations must have been made at the time of the act done, which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them, as obviously to make one transaction. *Enos v. Tuttle*, 3 Conn. Rep. 250.

If the intentions of the defendant in sending his order to Child, or his belief in receiving the goods, could serve to explain the transaction, or in any manner to determine the rights of the plaintiffs, they would be admissible under the rule we have stated. But no such effect can be accorded to them, unless it was shown that the plaintiffs were aware of his intentions. In the absence of all proof to the contrary, it must be intended that the plaintiffs were influenced in sending the goods to the defendant by his written order, addressed to one of the firm. The question then is, were the plaintiffs authorised by that order to make the defendant their debtor by sending him the articles ordered. Child, together with his co-plaintiffs, were commission merchants in the city of Mobile, and in that character, could not, it is presumable, have been engaged in the business of selling goods upon his own account, and for his exclusive benefit; so that it is a question of fact, properly determinable by the usual course of dealing, whether the letter, though addressed to him individually, might not be regarded as an order which the firm were authorized to fill. If it was, his liability to the plaintiffs, admitting the goods have been forwarded, is unquestionable.

An authority to buy goods will authorise a purchase on the credit of the principal, and even the giving of a security for the purchase money, if there exists a usage of trade to justify it.—*Story on Agency*, 74. And will not an order to a commission

merchant, confer on him an authority equally extensive, if such is the usage? See *Edwards and Bonner v. Benham & Co.* 2 Stew't & P. Rep. 147. But suppose he finds it for the interest of his correspondent to purchase his goods for cash, if the course of trade authorises it, may he not borrow money on his credit, instead of thus purchasing the goods? These questions are merely suggested, and need not be here answered, as the case may be determined on other grounds.

In order to maintain an action for goods sold and delivered, it is not necessary to prove an express contract. In general, proof of the delivery of the goods to the defendant, or his agent, and that he has used them, is *prima facie* evidence of a contract, without proving any specific order. *Bennett v. Henderson*, 2 Starkie's Rep. 550. And this action is sometimes maintainable, though it appears that the defendant obtained possession of the goods tortiously. 3 Taunt. Rep. 274; 6 T. Rep. 681; 2 *ibid.* 145; *Hill v. Davis*, 3 N. Hamp. Rep. 384; *Gilmore v. Wilburn*, 12 Pick. Rep. 120. So, if one person, without any previous authority, buys goods as the agent of another, and deliver them to him, and he receives and uses them, he will be liable to the seller for their value, unless he has paid the buyer. *Kupfer v. Parish* in *Augusta*, 12 Mass. Rep. 185. And when goods are delivered to one person on the credit or request of another, the undertaking of the latter to pay, is direct, and an action lies against him for goods sold. *Stapp v. Anderson*, 1 A. K. Marsh. Rep. 539. We have merely stated these principles to show, that in this form of action the law is very liberal in implying a promise to pay, where the defendant has derived a benefit.

Here, if the evidence is to be accredited, the defendant has received and used the plaintiffs goods, and they may be the losers to the extent of their value, unless he pays them for them. True, the defendant supposed them to belong to Child, or he would not have received them, yet, having used them, he must account to the plaintiffs, as he received them without advice from any source, by whom they were sent. If the usage of trade did not authorise the plaintiffs to fill the order to Child, the defendant might have refused to receive the goods from them, or having received them under the impression, that Child was the sole consignor, immediately upon ascertaining

the fact to be otherwise, he could have given notice to the plaintiffs that they would be returned.

This view shows that the County Court erred, both in admitting the evidence of the defendant's declarations and belief, and in the charge to the jury. The judgment is consequently reversed, and the cause remanded.

ELLIOTT, ADM'X V. ESLAVA.

1. The resignation of an executor or administrator will not abate a suit then pending. If there be more than one, the suit will proceed in the name of or against those remaining; if he is the sole representative of the estate the suit will be revived in the name of his successor.
2. A plea that the defendants were not *joint* administrator and administratrix is frivolous.
3. An *estoppel* must, in general, be pleaded; if offered in evidence, the jury are not precluded from finding the truth of the case.
4. Upon the trial of an issue whether the defendant was administratrix at the time the suit was commenced, the record of the County Court showing the time of the appointment, is evidence of a higher grade than the statement of the time of her appointment, in the bond executed by her as administratrix.

Error to the Circuit Court of Mobile.

THIS was an action of assumpsit, brought in the Court below, by the defendant in error, against the plaintiff in error, as administratrix, and Frederick S. Blount, as administrator of John Elliott, deceased. The writ was executed on both defendants and both were declared against.

The defendants pleaded:

1. The general issue.
2. That they, nor neither of them, were administrator or administratrix of John Elliott, deceased, as in the declaration alleged, but that one George J. S. Walker, was duly appointed and qualified as the administrator of said estate.
3. That defendants are not, and were not, at the time of suing out the plaintiff's writ joint administrator and administratrix of the estate of the said John Elliott, deceased.

4. And the said Margaret Elliott, for further plea, saith that at the time of suing out the plaintiff's writ in this case, she was not, and is not the administratrix of the said Elliott's estate, but that one Frederick S. Blount, was then and there, and now is the administrator, *de bonis non* of said estate and this, &c.

Upon the first and fourth pleas, the plaintiff took issue. To the second plea, a replication was filed, that Margaret Elliott, was administratrix; and to the third plea, he demurred, which demurrer was sustained by the Court.

At a subsequent term of the Court, the resignation of Blount, one of the defendants, was suggested and the cause continued, and at the succeeding term, the following entry appears. Motion by plaintiff's attorney for leave to amend the declaration, by striking out the name of F. S. Blount, his resignation having been suggested at a former term of this Court, is granted. And the issues of fact being tried and found for the plaintiff, judgment was thereon rendered.

From a bill of exceptions taken, pending the trial, it appears that the plaintiff, to maintain the issues on his part, offered in evidence to the jury, the promissory note declared on, and a bond executed by the defendant, Margaret Elliott, on the 27th March, 1839, payable to the Judge of the County Court of Mobile, in the penal sum of twenty thousand dollars, with the following condition: The condition of the above obligation is such, that whereas, the above bound Margaret Elliott, has been duly appointed administratrix of the estate of John Elliott, deceased, in place of Frederick S. Blount, resigned: Now, if the said Margaret Elliott, &c.

To the introduction of this bond in evidence, the defendant objected, but the objection was overruled by the Court.

The defendant then proved that Walker and Blount, had successively qualified as administrators on the estate, and that afterwards, on the 27th of June, 1839, she was duly appointed, and qualified as administratrix, *de bonis non*, of said estate.

The defendant then moved the Court to instruct the jury, that as this was a joint action and the plaintiff had dismissed as to one of the defendants, he could not recover in this action against the other defendants, which charge, the Court refused, and the defendant excepted; and further, moved the Court to charge, that inasmuch as the defendant was administratrix, *de*

bonis non, of John Elliott, the plaintiff could not recover against her as administratrix in chief, which the Court refused, and to which the defendant excepted.

The defendant further requested the Court to charge the jury, that if the defendant was not appointed and qualified as administratrix *de bonis non*, until after the institution of this suit, that then the plaintiff could not recover, which charge the Court refused, and instructed the jury that if the administration bond of the defendant bore date before the institution of this suit, she was thereby estopped, and that it was immaterial, whether she had been appointed and qualified before the institution of this suit or not, to which the defendant excepted.

The assignments of error are,

1. The dismissal of the suit against Blount.
2. That there was a misjoinder of parties.
3. The matters set forth in the bill of exceptions.
4. The judgment on the demurrer to the third plea.

CAMPBELL, for the plaintiff in error—cited 6 Wendell, 284; 8 ib. 9; 5 Stew. & Por. 181; 1 Al. Rep. 330.

No counsel appeared for the defendant in error.

ORMOND, J.—By an act of the Legislature, Aikin's Digest, 179, § 9, "an executor or administrator may by writing, by him subscribed, and delivered into the clerk's office, resign his authority." There is no restriction or limitation to the exercise of this right, and when exercised by him, as his authority is at an end, he ceases from that time to represent the estate. Although the statute is silent, as to the effect such resignation shall have on suits then pending against the executor, we think it clear that it will not have the effect to abate the suit. By the 8th section of the same law, it is provided, that suits commenced by an administrator, *ad colligendum*, shall not abate by the appointment of an administrator in chief, but be continued in his name. The 30th section of the same law, expressly declares, that "when any suit may have been commenced on behalf of, or against the personal representatives of any testator or intestate, the same may be prosecuted by or against any person or persons who may afterwards succeed to such administration, and may at any time be made parties on motion."

This is decisive to show that the suit did not abate; such would not have been the effect, if the administrator who resigned, had been the sole defendant, and by necessary consequence, no such result can flow from his resignation, there being a representative of the deceased, a party to the suit still remaining.

The case of *Thomason & Haynes v. Blackwell*, 5 Stew. & Porter, 181, has been referred to, as an authority to show that an executor cannot resign pending a suit. That case was depending in the Orphans' Court, and after the trial of an issue, which ascertained the liability of the executor, but before a decree was rendered by the Court on the verdict, he tendered his resignation, which the Court refused to receive. This Court held, that whatever might have been the effect of a resignation at an earlier stage of the proceedings, it could have no effect after the liability of the executor was ascertained, and nothing remained to be done but the rendition of the decree. The Court too, lay stress on the fact, that the proceeding was in the Orphans' Court, where the resignation must be made.

It is obvious, that the decision made in the case cited, cannot affect this case, where the suit was depending in the Circuit Court, and the liability of the administrator, undetermined at the time the resignation was made. It might also, well be questioned, whether, if erroneous, any one but the plaintiff below, could take advantage of it. It results from what has been said, that the resignation of an executor or administrator will not abate a suit; if there be more than one, the suit will proceed in the name of, or against those remaining; or if he be the sole representative of the estate, will be revived in the name of his successors.

The demurrer to the third plea was properly sustained. It was wholly immaterial, whether the defendants qualified as administrators jointly or severally the plea being utterly frivolous; would have been stricken out on motion, and would therefore be bad on demurrer. The remaining question arises on the bill of exceptions.

The issue between the parties, was whether Margaret Elliott, the remaining defendant, was administratrix of the estate, when the suit was commenced. To prove that she was, the plaintiff read in evidence her administration bond, which bore date previous to the commencement of the suit, and in which

it was recited that she had been appointed administratrix of the estate of John Elliott, deceased. The defendant then proved that she was appointed and qualified administratrix *de bonis non*, on the 27th June, 1839, and after the commencement of this suit. The Court charged that she was estopped by her bond from denying the fact that her appointment was not anterior to the commencement of the suit.

The general rule is, that a party is estopped from denying what he has by his bond admitted to be true, but if the opposite party omits to plead it, he hereby consents to waive it and the jury will not be prevented from finding, according to the truth of the case. *Trevivian v. Laurence*, 1 Salk. 276; *Kilheffer v. Herr*, 17 Serg. & Rawl. 322; *Howard v. Mitchell*, 14 Mass. 241. Here the bond was offered in evidence, merely to prove the issue and therefore not conclusive on the jury, if the fact there admitted, was shown not to be true.

The testimony offered to contradict the bond, is not set out in the record. If, as we may presume, it was the record of the County Court, showing the time of the appointment and qualification of the administratrix, it was testimony of a higher grade than the admission of these facts in the bond. The date of the bond may be a mistake, or the bond may have been given in anticipation of the appointment on the same day, which was not done. Be this as it may, when the question to be determined, is the existence of a fact, which is matter of record, though the admission of the fact in a bond, would be proof of its existence, it would not be conclusive against the record, which is the highest evidence of the fact. If therefore, in this case, the bond had been pleaded as an estoppel, by the plaintiff, in his replication to the plea, the defendant, in her rejoinder, could have vouched the record of the County Court, showing the true time of the appointment, and qualifying of the administratrix, and it would have been a sufficient answer to the replication.

The Court, therefore erred in its charge to the jury on this point, and its judgment is therefore reversed, and the cause remanded.

STEWART and IRVINE v. FRY'S ADM'RS.

1. When a mortgage of personal estate, which is removed to this, from another State, subsequently to the incumbrance, has lost its priority of lien, as to creditors whose debts are contracted here after the removal of the property, under the act of 1823—Aikin's Digest, 207, § 4—this matter can not be urged by the personal representatives of the mortgagor, as a defence to the mortgagee's bill for foreclosure and sale. The proper course, under this statute, where the creditor has obtained no specific lien by judgment and execution, is to file a bill against the personal representative of the mortgagor, joining the mortgagee, and asserting the right to satisfaction for his debt, by subjecting the mortgaged chattel to its payment.
2. The profits arising out of the use of a personal chattel, may be made the subject of a mortgage.
3. Where the mortgagee permits the mortgagor, *who is also the debtor*, to receive the mortgaged profits, the former is not entitled to have an account against the personal representatives of the latter, for sums received by him in his lifetime.
4. And the rule is the same, although there is a specific contract, to apply the profits to the extinguishment of the debt. In such a case, the profits, when received by the mortgagor, and carried into his general funds, can not, after his death, be reached by the mortgagees, as a trust. The trust fund is not capable of distinction, and it remains only as a general debt against the estate.
5. Such a contract, to apply the profits in extinguishment of the debt, is binding on the personal representative, and if profits are realized by him from the use of the chattel after the mortgagor's death, they are to be accounted for to the mortgagee, and are not to be considered as general assets of the estate.

Appeal from the Court of Chancery for the first District of the Southern Division.

THE object of the bill, in this case, is to obtain satisfaction of sundry debts due from the defendants intestate, and secured by a mortgage of the steam-boat Jefferson, executed by him in Kentucky, in the year 1837. When the mortgage was executed, the intestate was a resident of Mobile, in this State, to which place he removed the steam-boat, and continued to run it until his death, which took place in 1839. The defendants qualified as his administrators, entered into the possession of the boat, and continued to run it until the exhibition of this bill.

The mortgage deed contains a stipulation, that all the clear profits of the boat, should be applied to the extinguishment of

the debts, in the order in which they are named in the mortgage.

The prayer of the bill is, that the defendants may state an account of the profits received by their intestate and themselves, from the use of the boat, and apply them to the payment of the debts; also, that the boat may be sold, and the proceeds applied to the same purpose.

The defendant, B. H. Fry, alone answers the bill; he admits the execution of the mortgage, requires proof of his intestate's indebtedness, and insists, as the mortgage was not registered in Alabama, until the year 1840, that therefore, the creditors of his intestate, whose debts were contracted here, after the removal of the boat, and previous to the registration of the mortgage, cannot be prejudiced by it, and that the administrators are entitled and bound to hold the boat as general assets of the estate, to be applied to the payment of all debts, free from the lien of the complainant.

The answer also asserts that the estate is greatly insolvent, and sets out a schedule of the creditors and the several amounts of their demands.

Evidence was taken, sustaining the allegations of the bill and answer, and the Chancellor at the hearing dismissed the bill with costs but without prejudice. The complainants appealed from this decree, and now insist that the Chancellor should have proceeded to decree an account for the profits and for the sale of the boat.

STEWART, for the plaintiffs in error.

DUNN, contra.

GOLDTHWAITE, J.—The principal question, and that, most probably, which the Chancellor considered as decisive of this case, arises from the facts disclosed by the answer. This, after admitting the execution of the mortgage in the year 1837, asserts that the mortgagor then was a resident of Mobile, engaged in the business of steam-boating; that soon after the mortgage was executed, he conveyed the boat to that place, where the mortgage was registered, in the year 1840, and not previously; that the mortgagor contracted various debts on the credit given by the possession of this and other boats; that he died insolvent; that his estate has been so represented by

the defendants, and so declared by the proper authorities.—The answer insists from these facts, that the mortgage has lost its lien on the boat, as to those creditors whose debts were contracted by the intestate, after the boat was removed to this State, and previous to the registration of the mortgage; and that the defendants are entitled to hold the boat, with the profits derived from it, as assets of the estate.

The act of 1823, which is supposed to confer this right on the administrators, is in these terms: "All property mortgaged, or under any deed of trust, or other legal incumbrance, which may afterwards be removed to any county in this State, shall be liable to the payment of any debts, which the holder of such mortgaged property may contract, after his settlement in such county, unless the mortgage, deed of trust, or incumbrance, covering such property so removed as aforesaid, shall be duly recorded, in the clerk's office of the County Court of the county to which such property may be removed, within six months, unless the person bringing such incumbered property into any county in this State, shall have removed from another State, in which case, one year shall be allowed for the recording of any such mortgage, deed of trust, or other legal incumbrance, after such settlement as aforesaid: *Provided, however,* That after such record duly made, the provisions herein [contained] shall cease to take effect." Aikin's Digest, 207, § 4.

It is not our intention to enter upon any examination of this statute, because our opinion is, that the administrators of the intestate are incompetent parties to assert the rights of creditors against the mortgagees. The mortgagor, if living, would not be allowed thus to defeat his own incumbrance, and his personal representative stands in precisely the same relation to the mortgagees. An admission that this mortgage, from the omission to register it in the county of Mobile, has lost its lien as to those debts of the intestate, contracted after the removal of the boat to this State, would only show the necessity of confining the litigation on this subject, to those creditors and the mortgagees, who alone are interested in the question in dispute. We cannot perceive how any act or admission of the administrators can, in any manner, affect the rights of either of those parties in interest. The conclusive objection to any decree in

this suit which would confer rights on the creditors generally, or any particular class of them, is, that they are not before the Court as parties; nor, indeed, can they be brought before it except by their own act. We think it cannot be properly contended, that those mortgagees are bound to ascertain that there are creditors who may have an equal or a paramount right to themselves; nor ought it to be imposed on them to litigate questions with the administrators, when those interested in the decision cannot be bound by the decree, or compelled to pay costs, if it is adverse to their interests. But, independent of all these considerations, we cannot conceive how this estate can be satisfactorily settled in the County Court, if this boat, incumbered as it is, shall be considered as general assets belonging to the estate, from the single fact, that there may be creditors of the intestate, whose debts were contracted before the execution of this mortgage. Such creditors, certainly, would have no claim under the statute, and yet they would share *pro rata*, with the mortgagees, if the boat is to be held and distributed as general assets.

The only course which seems to be proper, under the statute, when the creditor has obtained no specific lien by judgment and execution, is, for him to file a bill against the administrator of the intestate, joining the mortgagees and asserting his right to satisfaction for his debt by subjecting the mortgaged chattel.

In the case of *Boyd & Swepson v. Stainback, et al.* 5 Mum. 305, this was held to be the course of proceeding by the creditors against one who had loaned slaves to the intestate, which loan, as to these creditors, was to be considered as an absolute gift, in consequence of the omission to record the reservation, pursuant to a statute of Virginia, similar to our own statute of frauds, and very similar, in principle, also, to the statute just recited.

Although this conclusion necessarily causes a reversal of the decree rendered by the Chancellor, yet, there remain some other questions with respect to the right claimed by the mortgagees to call for an account of the profits made from the use of the boat.

2. And first, as to those made and received in the life time of the intestate.

It has been suggested, that the profits to be derived from a personal chattel, cannot be made the subject of a mortgage, inasmuch as they are not in existence when the incumbrance is created; and, in a case like this, because the chattel itself was not delivered.

An argument based on this suggestion, would be specious, but, as it seems to us, notwithstanding, would be unsound, because it is certain, that rents, fairs, waifs, markets, ferries and the like, may be mortgaged. 1 Powel on Mort. 18. We are not aware that any just distinction can be drawn between a rent issuing out of real estate, and a profit arising from the use of a personal chattel, so far as concerns the capacity of each to be mortgaged. When the two conditions of debtor and mortgagor are separated and attached to different persons, it will be readily perceived that there is no good reason why the profits of a personal chattel may not be pledged as the security for the debt of another; and if for the debt of another, it must follow that it may be so pledged for the mortgagor's own debt.

We will not, for the present, involve this question with the difficulties which must arise in settling the priority of right, when the contest is between a creditor or subsequent purchaser, and the mortgagee, and the latter has permitted the mortgagor to retain the chattel in his possession; nor is it necessary that we should examine how far such a mortgage could be made available against the debtor himself, in a case where the profits would depend, necessarily, much more upon the skill and capacity of the person using the chattel, than upon any inherent quality in the chattel itself.

We wish to be understood, for the present, as deciding only that the profits arising out of the use of a personal chattel, may be made the subject of a mortgage.

3. Although such profits may be made the subject of a mortgage, it is obvious, when the mortgagor is left in possession of the chattel, that he will receive them, in the first instance, and therefore, when the mortgagor is also the debtor, the creditor has no remedy, either at law or in equity, for the profits so received. And this peculiarity arises from the fact that the precedent debt is in existence; for which the creditor has his remedy at law. No matter what the amount of the profits may be, the creditor cannot recover more than his debt, and it would be

futile to recover less. The profits when thus received, constitute nothing but a debt. But, there is an aspect in which this case will be presently considered, when it will become important to ascertain the amount of profits received by the administrators since the death of the intestate; but as to those made and received by the intestate in his life time, we are not aware of any adjudicated case which authorises us to declare that the mortgagee may call for an account of such profits, *eo nomine*, either at law or in equity. There are several cases, however, in which the reverse is held as the settled rule. *Higgins v. The York Buildings Company*, 2 Atkyns, 107; *Mead v. Lord Overy*, 3 Atkyns, 235.

In *Coleman v. The Duke of St. Albans*, 3 Vesey, jr. 25; Lord Rosslyn, thus declares the rule: A mortgagee is not entitled to have an account against the mortgagor for the profits of the estate mortgaged, which have been received by the mortgagor, and applied to his own use; and the rule is the same where the mortgagor has actually given the mortgagee a power to receive. If the mortgagee omits to use that power, he must impute it to himself, if the profits are gone; it is against all rules of equity to decree an account against the mortgagor for the time when he has, by the connivance, or to speak more properly, by the permission of the mortgagee, received the profits and applied them to his own use.

At law, the mortgagee is not permitted to call on the tenant of the mortgagor, until a default in the mortgage and notice to the tenant. *Moss v. Gallimore*, Doug. 279; *Birck v. White*, 1 Term R. 384.

It is for these reasons, we conclude that, as mere mortgagees, the complainants are not entitled to an account for the profits received by the intestate in his life time.

4. But it is urged that the complainants are not merely mortgagees; that there is a specific contract to apply all the clear profits made by the boat to the payment of the debts secured by this mortgage.

Independent of the rule peculiarly applicable to mortgages, these profits, so far as received by the intestate, and carried into his general funds, cannot be reached by the mortgagees as a trust. In such a case, the trust fund is not capable of distinction, and it remains only as a general debt. This is the univer-

sal rule, both with respect to bankruptcies and intestacies.—*Trecothick v. Mason*, 4 Mason, 16; *Maury v. Mason*, 8 Porter, 211.

5. Secondly, as to the profits received by the administrators since the death of the intestate. We have already shown the general rule which governs the receipt of rents and profits by the mortgagor, but we think a very obvious distinction exists in those cases where the mortgagor stipulates that he will apply the rents and profits to the extinguishment of the debt.—We have also shown that a stipulation of this description is of no importance when the mortgagor is the debtor, *so long as he lives and is solvent*, inasmuch as the receipt of the profits would add nothing to the legal or moral obligation to discharge the debt; but, in our opinion, this becomes a very important consideration whenever the mortgagor is a different person from the debtor, or whenever the mortgagor is dead or has become bankrupt. In the first case, he becomes a debtor to the amount of the profits actually received, to the extent of the secured debt; and in the two latter cases, the mortgagee is entitled to preference over the general creditor, whenever the stipulated fund has been kept separate, and can be clearly distinguished from the general funds of the bankrupt or intestate.

The case of *Coleman v. The Duke of St. Albans*, before cited, unless critically considered, might lead to an impression that there is no room to make this exception to the general rule. In that case, duke George was the original debtor, and mortgaged the office of the Register of the Court of Chancery, which was vested in him and his heirs, for the lives of other persons; the mortgage contained a *personal covenant* to pay the debt. He died without payment, and the office descended to his son, who, with the consent of the mortgagee, surrendered it to the crown and took a new grant, after which, he (the son) mortgaged the office again to the same creditor, for the same debt, and authorised him to receive the profits from the deputy registers, but did not enter in *any covenant, either to pay the debt or to receive the profits of the office to the use of the mortgagee*. The last mortgagor also died, and his heir entered into the office and received its profits. A demurrer was sustained to a bill by the creditor seeking an account of the profits received by the heir of the last mortgagor, on the allega-

ion that the office itself would not produce a sum sufficient to discharge the debt.

It is evident, that in that case there was *no specific appropriation* of the profits of the mortgaged office for the payment of the debt due from the personal representatives of duke George. Independent of the mortgage, there was nothing more than a *mere power* to receive the profits which might be exercised or omitted by the mortgagee at pleasure, and until this power was exercised, or notice given of the intention to exercise it, the heir of the mortgagor was in no default, and incurred no liability by receiving the profits to his own use.

In the case we are called on now to determine, the mortgage contains an express stipulation, that although the profits shall be received by the mortgagor, yet, he will apply them to the discharge of the debts specified.

We think it does not admit of question, that this stipulation is binding on the personal representatives of the mortgagor, and that as long as the profits can be specifically traced, and which have not been carried into the general fund, they are to be accounted for to the mortgagee, and should not be considered as general assets of the estate.

It is certain that the profits received by the administrators, from the use of the boat since the death of the intestate, can be designated with accuracy, and that they have not been mingled with the general funds of the deceased, so as to be incapable of separation.

The remarks made by us in the commencement of this opinion, as applicable to the boat, in connexion with the statute, apply with equal force to this portion of the profits. If the boat itself is subjected to the payment of particular creditors, the profits follow as an incident. But we repeat that we cannot investigate those rights upon this bill.

We think the Chancellor ought not to have dismissed the bill, but should have proceeded to decree a foreclosure and an account for the profits received by the administrators since the death of the intestate, if the bill was in a condition to be heard upon the merits, which is a matter that has received no examination from counsel.

The decree is reversed, with costs, and the cause remanded for further proceedings.

KENNEDY'S EX'RS V. GEDDES & Co.

1. A promise to accept a bill thereafter to be drawn, for goods to be sold to a third person, is binding in law, and an action will lie for its breach; although at the time the promise was made, the amount of the bill, or precise period when it was payable was unknown: and it is no objection to a bill drawn and presented upon the faith of such a general promise, that it had four months to run, and that interest was calculated on the account, for goods sold—Such being the usual course of dealing, and the drawee making no objection when the bill was presented for acceptance.
2. Where documentary proof is offered for the purpose of discrediting a witness, its relevancy should be made apparent, or it may be rejected.
3. Where a bill presented to a drawee for acceptance, was at his request, left with him, a notice to his executors, after his death, to produce it on the trial of an action against them, for the refusal of their testator to accept, will authorise the admission of parol evidence of its contents, although they deny it ever came to their possession.
4. The death of the defendant, J K, was suggested of record, and a *scire facias* directed to issue to his representatives, without naming them, or characterizing them as executors or administrators; a *sci. fa.* issued, describing R L W and W R H as executors, and was served on them, but they were not formally made parties. The cause, in the margin of the judgment, is thus stated—“Robert Geddes & Co. v. Joshua Kennedy's ex'rs,” and the entry recites that the parties came by their attorneys, and thereupon came a jury, &c; the judgment is, that the plaintiffs recover against the defendants, to be levied of the goods, &c. of J K, dec'd, in the hands of R L W and W R H, his executors. to be administered: *Held*, that the judgment and its recitals was a waiver of all informality, and equivalent to an express assent to be made defendants.

Writ of error to the County Court of Mobile.

THE defendants in error, brought an action of *assumpsit* against the plaintiff's testator. The declaration contains several counts. In the first count, they charge the testator as the acceptor of a bill of exchange, drawn by one Samuel A. Carpenter, on the 15th of March, 1834, for the payment four months after date, of the sum of four hundred and forty-nine 60-100 dollars, to their order. The second count states, that the testator undertook and agreed with the plaintiffs, if they would sell and deliver to Samuel A. Carpenter, certain goods, wares and merchandize, he, the testator, would after such sale and delivery, accept a draft or bill of exchange, to be drawn by Carpenter, for the amount of goods, &c. purchased by him. It is then alleged, that confiding in the promise and undertaking

of the testator, the plaintiffs sold goods, &c. to Carpenter, amounting in value to the sum of four hundred and forty-nine 60-100 dollars; and that on the 15th of March, 1834, Carpenter drew his bill on the testator, requesting him to pay that sum to the order of the plaintiffs, four months after date. It is further avered, that the bill drawn by Carpenter, as aforesaid, was duly presented to the testator, for acceptance, and that he wholly failed and refused to accept the same, as he had promised to do. The declaration concludes with the usual averment of the testator's liability to pay the plaintiffs, and his promise to do so.

The cause was tried on the general issue, the executors having been previously made parties defendant, instead of Joshua Kennedy, who died pending the suit. On the trial, the defendants excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiffs offered and relied upon a deposition of N. Patterson, to establish their right to recover on account of the refusal of the testator to accept the bill therein named. The plaintiffs having given notice to the defendants to produce the bill on the trial, demanded its production, but the defendants did not produce it, alleging as an excuse, that it was not in their possession. The plaintiffs offered no other evidence.

The defendants then, to impeach the credibility of N. Patterson, the plaintiff's witness, offered certain papers, which he proposed to prove, were in his hand writing. This evidence was objected to, as irrelevant, and excluded by the Court.

The defendants counsel prayed the Court to instruct the jury, that the evidence adduced by the plaintiffs, was not sufficient to authorise them to recover, and that it should be disregarded. This, the Court refused, and instructed the jury, that if from the testimony, they were satisfied the testator promised to accept the bill, and after the goods were sold he refused to accept, and that the bill was left with him, then it was a violation of a contract, and the plaintiffs were entitled to recover under the second count, the amount of damages they had sustained. "To which the defendants excepted" &c.

The deposition of Patterson, is a minute recital of the facts to which the witness testifies. In substance, it proves the promise and undertertaking of the testator to pay the plaintiffs

for such goods as they might sell and deliver to Samuel A. Carpenter. The sale of goods amounting (with interest added, on the amount for provisions, for two months) to four hundred and forty-nine 60-100 dollars. The witness states that it was the custom to add interest after sixty days, on accounts for provisions sold; that he understood from Carpenter and the testator, that they were in partnership in building a mill, and that the debt contracted by Carpenter with the plaintiffs, was to promote the erection of the same. Witness knows that the credit was given to Carpenter upon the promise of the testator to accept a bill, and the testator admitted to the witness, that such was the fact. The witness further testified, that a bill of four hundred and forty-nine 60-100 dollars was drawn on the testator on the 15th of March, 1834, payable to the plaintiffs, four months after date, which bill, he (the witness,) presented as the agent of the plaintiffs to the testator and requested his acceptance thereof: the testator told the witness to leave the bill, and he would see Carpenter, and call down in a day or two, but would not then accept it. The testator in a conversation more than two years afterwards, told the witness, that he would not accept the bill, or pay any more for Carpenter, as the latter had made the mill cost more than it should have cost.

STEWART, for the plaintiff in error. The evidence of Patterson should have been disregarded as being insufficient to entitle the plaintiffs to recover. *Kennedy v. Geddes & Co.* 8 Porter's Rep. 263; 17 Serg't & R. Rep. 45. The promise of Kennedy, if made, as testified, was invalid in itself, and besides was too indefinite and general in its terms to subject him to an action for a breach. The evidence offered to discredit the plaintiff's witness, was improperly rejected, and parol evidence of the contents of the bill, alleged to have been presented to Kennedy for acceptance, was improperly received; as it was, it did not show that the bill was delivered to him.

The Court also erred in the charge to the jury, in not requiring the proof to be sufficiently broad to make out the case stated in the second count of the declaration. It is not supposed by the charge, that it was necessary the goods should have been delivered to Carpenter upon the faith of Kennedy's promise, but

that it was enough for the plaintiffs to show a promise by Kennedy to accept the bill of Carpenter, and a refusal to do so, after the sale of the goods to the latter. This was an obvious misconception of the undertaking to accept.

But if all the objections stated are untenable, then it is insisted that the executors of Joshua Kennedy, were not regularly made parties, and no judgment could be rendered against them.

LESESNE, for the defendant. When this cause was in this Court, in the life-time of Joshua Kennedy, it was held, that the proof was insufficient to charge him as an acceptor. 8 Por. Rep. 263. But since that time, a declaration has been filed the second count of which charges a failure or refusal to accept according to a previous promise and undertaking, and the question now, is, does the proof sustain that count. An action will lie upon the breach of a promise to accept a bill, if the promise be founded upon a sufficient consideration. *Townsend v. Samuel*, 2 Peters' Rep. 170; *Boyce & Henry v. Edwards*, 4 Peters' Rep. 111; *Smith v. Brown*, 6 Taunt. Rep. 340; *Chitty on Bills*, 9 Am. ed. 326; *Bailey on Bills*, (last ed.) 166, note G; *Lang v. Barclay*, 1 B. & C. Rep. 399; *McEver v. Main*, 10 Johns. Rep. 215; see also, 2 Wheat. Rep. 66.

With respect to the evidence offered by the plaintiffs in error to discredit the testimony of the witness, Patterson, it may be sufficient to remark that its exclusion is not made the ground of exception, and cannot, consequently, be assigned for error *Bank of Alabama v. McDade*, 4 Porter's Rep. 352. But if the question of its admissibility were raised, it would be held, that the County Court properly excluded it as irrelevant testimony *Lawrence v. Barker*, 5 Wend. Rep. 301, '2, '5; 2 Phil. Ev. 729 C. & H. ed.

The death of Joshua Kennedy was duly suggested, and a *scire facias* thereupon issued, and served on the defendants and his executors, who appeared and went to trial. This, it is presumed, will estop them from insisting upon a formal order reviving the cause against them.

COLLIER, C. J.—The questions now presented for decision, are essentially different from those that were considered when this cause was here at a previous term. The main ques-

tion then was, "whether a verbal promise, to accept a bill, not *in esse*, will, in law, amount to an acceptance." While the Court recognized the principle, "that a promise, in writing, to accept a bill of exchange, not *in esse*, will be in law, an acceptance, if the bill be taken on the faith of such promise," they were of opinion, that as in this case, "it was uncertain for what amount the bill was to be drawn, when it was to be drawn, and when payable," the promise did not amount to an acceptance. 8 Porter's Rep. 263.

By taking issue upon the declaration, there was a tacit admission, that the cause of action was legally sufficient, and the questions arising at the trial, relate to the admissibility and sufficiency of the proof adduced by the parties, and the charge to the jury. But if the defendant had interposed a demurrer to either of the counts of the declaration, it would have availed him nothing. The first count, is undeniably good, while it insisted, that the second, is defective, in seeking to recover upon a promise obnoxious to the statute of frauds. This objection cannot be maintained by authority. In *Townsley v. Sumrall*, 2 Peters' Rep. 170, which was an action upon a promise made by the defendant, as a partner in a mercantile concern, that the firm would accept a draft, or drafts, to be drawn on them by one Waters, in favor of the plaintiff. The Court was of opinion that the action was maintainable, notwithstanding the number and amount of the bills may not have been stipulated by the parties; and that it was not a promise to answer for the debt, &c. of another within the statute of frauds, but a primary and independent engagement. So, in *Boyce and Henry v. Edwards*, 4 Pet. Rep. 122, the Court say, "the distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw, may be collected from the circumstances, and extended to all bills, coming fairly within the scope of the promise." See also, *Chitty on Con.* 4 Am. ed. 348; *Chitty on Bills*, 9 Am. ed. 308, and cases there cited. Let these

citations, suffice to show, that the second count discloses a good cause of action in averring the promise to accept, for goods to be sold to Carpenter, the sale of the goods upon the faith of the promise, the drawing of the bill by Carpenter, and the refusal of Kennedy to accept it.

The papers offered by the defendants to impeach the credibility of the witness, Patterson, are, an account of Samuel A. Carpenter with John B. Page & Co. dated in 1833, a note of Carpenter to Joshua Kennedy, dated September 19th 1833, for the payment of three hundred and fifteen dollars and nine cents, at four months, and a bill drawn by Carpenter on Kennedy, on the 16th November, 1833, for the payment to John B. Page & Co. of the sum of four hundred and ninety-four dollars twenty-two cents, at four months date. We are unable to discover, from any thing in the record, what relation these papers had to the testimony of the witness, and are consequently of opinion, that they were properly rejected by the County Court, as irrelevant.

The evidence adduced by the plaintiffs, if credited by the jury, was entirely sufficient to authorise their verdict. It proves a promise, by the testator, to accept a bill for goods to be sold by the plaintiffs to Carpenter, the sale upon the faith of the promise, the drawing of the bill in a reasonable time thereafter, its presentation to Kennedy, and his refusal to accept. It was no objection to the bill, that it was payable four months after date, and that interest was added on the account after sixty days. The witness states that such was the usual course of dealing, where accounts were of the character of that made by Carpenter, and we must intend, that the testator's promise, was made in reference to the mercantile usage in such cases; the more especially as he placed his refusal to accept the bill upon grounds entirely distinct from the length of time it had to run, or the addition of interest upon the account.

But it is objected, that the bill should have been produced at the trial, or its absence more satisfactorily accounted for. It appears from the evidence, that upon its presentation to the testator, he desired it to be left with him for a few days, that he might determine whether he would accept it. It is not shown that he ever returned it, or that he was called on by the plaintiffs, or their agent to learn his determination. The con-

versation, which Patterson states in his deposition, he had with the testator, appears to have taken place more than two years after the bill was left with him, for acceptance. The reasonable inference then is, that the bill remained with the testator, and its non-production upon a notice to his executors authorised the admission of parol evidence of its contents.

It must be admitted that the proceedings in the County Court, to bring in the executors of Kennedy, are loose and informal. The death of the testator is suggested of record, and a *scire facias* directed to issue to his representatives, without stating who they are, and whether executors or administrators. A *scire facias* issued, in which Robert L. Walker and William R. Hallett, are described as executors, which appears to have been duly served upon them, but without formally making them parties: the cause was tried by a jury. The statement of the case in the margin of the judgment, is "Robert Geddes & Co. v. Joshua Kennedy's executors." The entry recites, that the parties came by their attornies, and thereupon came a jury, &c.; the judgment is, "that the plaintiffs recover against the defendants, to be levied of the goods and chattels of the said Joshua Kennedy, deceased, in the hands of William R. Hallett & Robert L. Walker, his executors to be administered" &c. The description of the plaintiffs in error, in the *scire facias*, as executors of the original defendant, the service of that process on them, which required them to shew cause why the suit should not be revived, the designation of them in the judgment, as executors, and the recital that the executors appeared and went to trial, was a waiver of all informality, and equivalent to an express assent to be made defendants.

The charge to the jury, seems to us, to be entirely consistent with the law, as we have laid it down. It obviously contemplates that the plaintiffs must have sold goods to Carpenter, upon the faith of Kennedy's promise. The charge contemplates *in totidem verbis*, the promise to accept for goods to be sold, the sale of the goods, and the refusal to accept. This, taken in connection with the evidence in the record, sufficiently shows the meaning of the Court, was, that the sale of the goods should have been made, in reliance upon the testator's promise for payment.

This view is decisive of the case, and the consequence is, the judgment of the County Court is affirmed.

SHAW V. YARBROUGH.

1. Where issue is joined on the plea of the statute of limitations, the jury have nothing to do with the justice of the account.
2. The plaintiff may reply the statute of limitations to an account pleaded as a set-off, notwithstanding the claim sued on is obnoxious to the same defence, which the defendant omits or neglects to plead.
3. The exception in the statute, in favor of dealing between merchant and merchant, must be relied on by a replication to the plea.

Error to the County Court of Sumter.

THIS was an action of assumpsit brought in the Court below, by the plaintiff in error, against the defendant, on an open account. To a declaration in the usual form, the defendant pleaded as an off-set, an open account due from the plaintiff to him, to which plea the plaintiff replied, that the account pleaded as an off-set, did not accrue within three years, &c., upon which replication issue was joined.

From a bill of exceptions taken at the trial, it appears that the account of the plaintiff against the defendant, was a book account, created in 1835, and that the defendant admitted its correctness, and that it was not barred by the statute of limitations. The defendant produced his account, which was also dated in 1835, and proved its correctness, but adduced no proof to take it out of the statute of limitations. The plaintiff then moved the Court to charge the jury, that the defendant was not entitled to his off-set without proof, to take the account out of the statute of limitations. But the Court refused thus to charge, and instructed the jury, that if the account was proved to be correct, they must allow it—to which the plaintiff excepted.

The jury found for the defendant, and judgment was render-

ed accordingly, from which the plaintiff prosecutes this writ of error, and now assigns for error, the refusal to charge, and the charge as stated in the bill of exceptions.

HAIR, for the plaintiff in error.

RUSHING, contra.

ORMOND, J.—The issue presented to the jury was, whether the account pleaded as a set-off, accrued within three years before the commencement of the suit. The justice of the account was a matter the jury had nothing to do with, and the charge of the Court was clearly wrong. It is supposed by the counsel for the plaintiff in error, that the exception of the statute in favor of dealing between merchant and merchant, will justify the charge of the Court, but nothing of that kind appears on the record. If such was the fact, it should have been relied on in the replication to the plea.

The right to plead the statute of limitations to a debt pleaded as a set-off, is undoubted. This case, however, presents the apparent anomaly of the plea of the statute of limitations, interposed to a plea of set-off, when the debt of the plaintiff is obnoxious to the same defence. This apparent incongruity the defendant might have prevented by interposing the plea of the statute as well as the plea of off-set. In cases where the defendant cannot plead such a plea, in consequence of the plaintiff having issued process to prevent the statute from running, it, has been held that it will also prevent the statute from running against the defendant's demand, although he has issued no process. *Ord v. Ruspini*, 2 Esp. N. P. 569.

Let the judgment be reversed, and the cause remanded.

ANDREWS, USE, &C. V. ROACH & COFFEY.

1. A contract to carry cotton from a landing on the Tennessee river to New-Orleans, at fifty cents per hundred pounds, although in writing, does not preclude the boat owner from showing the existence of a custom on that river, of charging lighterage, in addition to the freight, whenever the tide in the river is so low throughout the season, as to prevent cotton boats from passing the Muscle Shoals.

Writ of error to the Circuit Court of Jackson county.

ASSUMPSIT to recover a sum of money due from the defendants to the plaintiffs, for the freight and lighterage of a quantity of cotton shipped by a flat-bottomed boat, from Cross's Landing, on the Tennessee river, to New-Orleans. The declaration contained a special count on the contract, and two of a general character. The defendants pleaded *non assumpsit* and set-off.

At the trial, a bill of lading was shewn in evidence to the jury. This recites the shipping of the cotton by the defendants, to be delivered, &c. at New-Orleans, the dangers of the rivers only excepted, to the defendants or their assigns, they paying freight therefor at the rate of fifty cents per hundred pounds, payable at the residence of the defendant, Roach, in Alabama bank notes. The plaintiff farther proved the delivery of the cotton in New-Orleans, with the exception of three of the bales, two of which were damaged, and the third entirely lost.

The plaintiff also offered to prove that, during the season in which the cotton was shipped, there was no tide in the Tennessee river sufficient to carry cotton boats over the Muscle Shoals, on said river, and that in consequence thereof, the plaintiff was compelled to lighten the cotton over said shoals. This lightering consisted in taking the cotton out of large boats, and placing it in smaller ones, thus carrying it over the shoals in them, and when over, in replacing it in the larger boats. That this lightering cost the plaintiff one dollar and a half per bale; and that for the last fifteen years it has been the universal custom in said business on the said river, for the freighter to charge for lighterage, and for the consignor to pay it; and that this

custom prevailed in all cases where bills of lading were given, and nothing was said therein as to the lighterage. This evidence was excluded by the Court, to which the plaintiff excepted.

A verdict was found in his favor for a small sum, on which judgment was rendered. He now prosecutes his writ of error, and assigns that the Court erred in excluding this evidence.

ROBINSON, for the plaintiffs, cited *Bank of Columbus v. Fitzhugh*, 1 Har. & G. 239; *Collins v. Hope*, 3 Wash. C. C. 150; *Lewis v. Thatcher*, 15 Mass. 433; *Simpson v. Gazzam*, 6 Porter, 123; *Catlin v. Powell*, 6 Term R. 320; 3 Conn. R. 9; 11 Mass. R. 85; 3 Greenl. 277; 3 Day's, 346; *Yeatman v. Bank of Alexandria*, 5 Cranch, 49; *Noble v. Kennoway*, Doug. 492; *Bank of Utica v. Smith*, 18 John. R. 230; 1 Camp. 503, 508; 6 H. & J. 408.

HOPKINS, contra, cited *Melter v. National Ins. Co.* 1 Hall, S. C. R. 452.

GOLDTHWAITE, J.—This case is not without difficulty, and the question which it presents, is one upon which there is some conflict of authority. It is without doubt, the general rule, that when parties have entered into a written contract, its terms cannot be controlled, varied or contradicted by parol evidence; yet there are many and unquestionable exceptions to this rule. The most familiar class is negotiable securities, which are almost always construed with reference to the customs prevailing in particular places. Most of the American cases on this subject, have been collated in the notes to *Phillips's Evidence*, by Cowen & Hill, 3 vol. 1411, but when they are all examined, it must be conceded that the multiplicity of decision, renders it exceedingly difficult to ascertain any fixed and specific rules by which the admission of such evidence is to be controlled.

In the case of the schooner *Reeside*, 2 Sumner, 567, the attempt was made to show the existence of a custom, that packet vessels engaged in trade between New-York and Boston, were not liable to pay for any damage except what should be occasioned by neglect. Judge Story sustained an exception to the proof of such a custom, as directly at variance with the

contract evidenced by the bill of lading. After admitting that he is unfriendly to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary or annul the general liabilities of parties under the common law, he says, the true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But he denies that it can ever be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, never in order to contradict them.

However true this may be in the main, it is certain, that with us, as well as in England, the doctrine of annexing customary incidents to contracts of particular descriptions, has long prevailed, and has been applied, not only to them, but to many other transactions of life in which known usages have been established. And it has been said these cases go upon the presumption that the parties do not mean to express in writing the whole of the contract by which they intended to be bound, but to make a contract with reference to those known usages. Parke Baron in *Hatter v. Warren*, 1 M. & W. 486.

In the present case, the effect of the custom offered in evidence, was not to contradict, vary or control that evidenced by the bill of lading, but rather to show that on the occurrence of an event contemplated by neither party, when the contract was made, that certain incidents attached to it from a particular usage. The dangers of the river were excepted against, and if the low stage of the water prevented the passage of the particular class of boats employed, through the shoals, the consequence to the shipper would most usually be disastrous, and yet, if this matter was of unfrequent occurrence, it would probably never form the subject of an express stipulation.

It would be unreasonable to conclude in such a course of bu-

siness, that the owner of the boat should perform that which his contract did not require him to do; and if such a custom exists as was offered in evidence, it most probably has grown up from the obvious benefit that it is to the shipper to get his cotton to market before the close of the season.

It may be remarked as applicable, and perhaps peculiar to this contract, that the boat owner, by its terms, would have been justified, in the absence of such a custom, as was offered to be proved, in not attempting to pass the shoals until enabled to do so with safety by a rise of water, and that in such a case, the injury would be great to the shipper; it is not unreasonable then to infer that this was not contemplated by the parties when the contract was made, and if not, certainly it cannot be said the usage controls or contradicts that which the parties have agreed upon. The contract contemplates ordinary dilligence to make the voyage; the usage applies only when circumstances call for extraordinary exertions not required by the contract.

We cannot doubt that such a usage, if made out by competent evidence, is proper, and that it only annexes an incident to the contract, equally beneficial to the shipper, and obligatory upon him.

The judgment must be reversed, and the cause remanded.

GAYLE, et al. v. MARTIN, et al.

1. A boat being libelled and seized, subsequent to the decree of condemnation and order of sale, a third person interposed as claimant, and executed a bond for the prosecution of a writ of error—Held, that the bond had no other effect than to arrest proceedings until the judgment of the appellate Court was rendered, and upon the affirmance of the decree, it was competent to execute the order of sale. This being the case, a bond subsequently executed to the libelants, in consideration of relinquishing their lien, conditioned to pay the judgments in their favor, should they not be reversed, is good as a common law obligation.
2. A bond to a number of obligees, conditioned to pay several and distinct judgments in favor of each, must be sued in the name of all the obligees, or the survivors of them, upon the principle, that they in whom the legal interest is vested, must join in an action at law.

THE defendants in error, brought an action of debt, against the plaintiffs, on a penal bond in the sum of one thousand dollars.

The defendants demurred to the declaration, and their demurrer was sustained. Thereupon, the plaintiffs filed an amended declaration, which was also demurred to. The amended declaration sets out, that the plaintiffs, on the 23d of October, 1838, commenced a suit by libel, in the County Court of Dallas, against the steam-boat Fox, her tackle, apparel and furniture, upon which such proceedings were had, that the boat was seized by the sheriff of that county. It is then averred, that at the December term, 1838, of the County Court, all the plaintiffs, with the exception of two, recovered several judgments for the amounts respectively due to them, and that the boat was condemned to their satisfaction—(the amount of each of these judgments is particularly stated;) and it was ordered by the Court, that a commission issue to the sheriff of Dallas, to expose the boat, her tackle, apparel and furniture, to public sale. It is further alleged that on the 19th of February, 1839, one James Read, having put in a claim to the boat, and been made a party to the record in the cause by order of the Judge of the County Court, executed a writ of error bond, and sued out a writ of error returnable to the June term, 1839, of the Supreme Court, thereby superseding the judgment, order and sale. And afterwards, on the 23d of March, 1839, the defendants, with the consent of the libellants, executed a writing obligatory, by which they acknowledged themselves held, and firmly bound unto the plaintiffs, in the penal sum of one thousand dollars, for the payment of which, well and truly to be made, they bound themselves, their heirs, executors, &c. jointly and severally, &c. conditioned, that whereas, there had been an attachment at the suit of said libellants, levied on the steam-boat Fox, which attachment was founded on the libel of said obligees and libellants, filed in the county court of said county, (meaning and referring to the suit aforesaid,) and the said Geo. W. Gayle for, and on behalf of the owners of said boat, claiming the sum, and for the purpose of replevying the same, bound himself as above: now if the said George W. Gayle, should well and truly pay such judgments as should thereafter be rendered on said libel, or such judgments as had already been rendered on said libel (meaning the judgments

Gayle, et al. v. Martin, et al.

aforesaid) in case the same should not be reversed, then that obligation to be void, else to remain in full force and effect. It is then averred, that in consequence of the execution of the writing obligatory, George W. Gayle, did then and there, receive the boat into his care, and under his control, and has not re-delivered, but has sold and disposed of the same. It is also alleged, that the matters set forth in said writing obligatory, mean, and refer to the plaintiff's libel against the steam-boat Fox, and the proceedings therein as above in this declaration stated.

The declaration then alleges the non-payment of the judgments in favor of the plaintiffs, although they still remain in full force; the writ of error to the Supreme Court having been dismissed by the judgment of that Court, and concludes in usual form.

After the overruling of their demurrer, to the amended declaration, the defendants, with the consent of the plaintiffs, pleaded informally, as follows:

1. That there was no such record of recovery in the said County Court, as in said declaration, and amended declaration, alleged.

2. That there is no record of said dismissal of said Supreme Court.

3. To the said amended declaration, that said writing obligatory declared on, was not made and executed by consent of the libellants, as in said declaration mentioned.

4. There never has been any demand made of the boat, her tackle; apparel and furniture.

The plaintiffs took issue on the first, second and third pleas, and demurred to the fourth. The demurrer was sustained, and judgment on the first and second pleas given for the plaintiffs; and the issue of fact being tried by a jury, a verdict was returned for the plaintiffs, and judgment thereupon rendered. To revise the judgment of the Circuit Court, a writ of error has been prosecuted to this Court.

PECK & CLARK, for the plaintiffs in error contended,

1. The bond on which the plaintiffs declared did not appear to have been founded on any legal consideration.

2. That a joint action cannot be sustained on the bond by all

the obligees; each obligee should have sued to recover the damages to which he was entitled. 1 Chitty's Plead. 9; 2 Saund. Rep. 116, note 2.

3. The bond must be regarded as separate and several, as it respects each obligee, for if joint, one could release the action to the injury of all. Eastman, *et al.* v. Wright, *et al.* 6 Pick. Rep. 316, 322, 323. And if a joint action is allowed, the defendants would be denied the right of set-off against any number of the obligees less than all; besides the plaintiffs have interests, separate and distinct, and not joint.

4. The obligees should have severed in the assignment of a breach.

EDWARDS, for the defendant, insisted—that the proceeding against the boat, being *in rem*, the writ of error bond did not require its return to the claimant, but merely superseded the order of sale. But admitting the law to be otherwise, the bond was voluntarily executed, for a consideration, not illegal, and was good at common law. Aik. Dig. 390; Acts of 1836, page 24; 21 Wend. Rep. 605; 5 *ibid.* 287; 3 Mass. Rep. 304; 5 *ibid.* 315; 2 Porter's Rep. 493; 5 Porter's Rep. 251; 6 Porter's Rep. 419.

The plaintiffs could not maintain separate actions of debt on the bond; whether each could sue in covenant on the condition, is another question. Here, the action is on the bond, and the breaches of the condition are alleged under the statute. The obligees have the legal interest and all must join. 9 Wend. Rep. 236; 12 *ibid.* 156; 1 B. & Pul. Rep. 72; 1 East' Rep. 500; 1 Chitty's Plead. 3, 4, 5, 6, 7, 8, 9. The breach follows the terms of the condition, and is consequently good.

COLLIER, C. J.—It is unnecessary to consider whether a bond, which appears on its face to be merely gratuitous, can be recovered by the obligee, as the bond declared on, appears to be founded upon a sufficient legal consideration. The libel against the steam-boat, in its effect, is unlike an ordinary action at law; by the seizure of the boat, the libellants acquired a specific lien upon it, which could only be discharged by the execution of a stipulation, such as the statutes, giving this extraordinary remedy, prescribe. 5 Porter's Rep. 251, Richardson, *et al.* v. Cleaveland & Huggins. The interven-

tion of Read, as a claimant, subsequent to the decree of condemnation, and consequent order of sale, and the simultaneous execution of a writ of error bond by him, had no other effect than to arrest the proceedings until the judgment of this Court should be rendered; upon the decree being affirmed, it was entirely competent for the sheriff to proceed to execute the order of the County Court. This being the case, we can conceive of no legal impropriety on the part of the libellants, in consenting, as it alleged they did, to relinquish their lien upon the boat, upon receiving a bond, conditioned to pay their judgments, should they not be reversed by this Court; and the consideration which the obligors received for their undertaking, being the delivery of the boat, without reference to its value, is sufficient to sustain it. There is no law which inhibits the taking of such a bond, nor is it opposed to any principle of policy, and it must consequently be good as a common law obligation.

It is insisted, that the action is improperly brought; that as the judgments are several, in favor of each of the obligees who recovered, so each should sue for himself, assigning as a breach, the non-payment of his judgment. In general, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the *legal interest* in such contract is vested. 1 Chitty's Plead. 3, and cases there cited. Under the influence of this rule, it has been held, that an action on a bond, can be maintained at common law, only by the obligee or his legal representatives. 4 Petersd. Ab. d.593, 634. And a bond given to one person for the benefit of another cannot be sued in the name of the latter. Sanford v. Sanford, 2 Day's Rep. 559; Sanders v. Filley, 12 Pick. Rep. 554. So it is also laid down, that all the obligees must join in the suit, and upon the death of one of them, the survivors alone can sue thereon, even though the bond is conditioned for payment to the deceased party, and the survivors have no interest in the sum contained in the condition. Hurlstone on Bonds, 96; 9 vol. L. Lib.; see also, Moller v. Lambert, 2 Camp. Rep. 548. It has been also said, that a release, by one of several joint obligees, will operate as a bar to all, while it has been held, that a third person, for whose benefit a bond is given, cannot even release the demand. Hurlstone on Bonds, 97. 1 Chitty's Plead. 4, and cases cited.

We have stated these principles, that it may be seen how strict the law is in requiring all the obligees in a bond, even without reference to their interest, to join in the prosecution of a suit against the obligors. Their right to join, is wholly disconnected with their right to release the cause of action, and depends exclusively upon the question whether the *legal interest* is in them. The undertaking is to pay all the obligees, *eo nomine*, and this is conclusive to show to whom the obligation is given. The case of Austin and others v. Hall, 13 Johns. Rep. 286, shows, that though a plaintiff may release to the prejudice of his co-plaintiffs, if the legal interest is in him, he must be joined in the action.

As the present case does not require us to consider the right of one obligee, where they are several, to release the bond, or of one plaintiff, where there are more, to discharge the action, we purposely decline expressing any opinion on these points.

The declaration then, is substantially good, and the cause of action, stated with sufficient precision, although this is done in more words than need have been employed, yet its verbosity was induced *ex abundanti contela*, and does not prejudice. It is not insisted, that the demurrer to the fourth plea, should have been overruled, nor indeed could it be with success; the condition of the bond not making a demand of the boat necessary, nor even contemplating its return.

From a view of the entire case, we are of opinion, that the judgment of the Circuit Court must be affirmed.

CARUTHERS & KINKLE v. MARDIS' ADM'RS.

1. A promise by one of several executors or administrators, will not take a case out of the statute of limitations.
2. An account, consisting of the price of a carriage, purchased and paid for by the plaintiff for the defendant, at his request, together with the costs of the transportation from New York to New Orleans, is not an open account, so as to be barred by the statute of limitations of three years.
3. Where there are several joint executors or administrators residing within the State, all must be served with process, and a discontinuance entered as to one, upon whom process is not served, will be a discontinuance of the action.
4. A judgment will not be reversed, though the Court may have erred in its charge, if upon the entire record it is obvious the plaintiff never can recover.

Error to the County Court of Talladéga.

ASSUMPSIT in the Court below, by the plaintiff in error, against the defendants in error.

The writ was sued out by the plaintiff against Leonard Tarrant, Mary E. Mardis and Reuben Mardis, adm'rs and adm'x of Samuel Mardis, deceased, executed on Tarrant and Mrs. Mardis, and not found as to Reuben Mardis. The declaration is in the usual form against those on whom the writ is served, and the action discontinued as to Reuben Mardis. The defendants demurred to the declaration, which being overruled, they pleaded,

1. The statute of *non claim*.
2. The statute of limitations of three years.
3. *Non assumpsit*.
4. Set-off, and
5. Payment.

On all of which, issue was joined:

Upon the trial before the jury, it appears from the bill of exceptions, that the plaintiff offered in evidence an account for seven hundred and sixteen dollars, which he had paid for the intestate of the defendant, for a carriage purchased for him, to which was added the freight from New-York to New-Orleans, which purchase was made in May, 1835, and proved the presentation of the account to one of the administrators within the

time required by law. The plaintiff also introduced an account book of the deceased, with the following entry in his hand writing: "Paid Caruthers & Kinkle, four hundred dollars, part of the amount due them for a carriage." And also proved the admission of Mardis, that he had directed Kinkle & Caruthers, to procure him a carriage from the north, and that the price there was seven hundred dollars, and that the carriage was received. It was also proved that one of the administrators had promised to pay the account.

Upon this testimony, the plaintiff moved the Court to charge the jury, that if they believed from the evidence, that the administrators or either of them, admitted the debt, and promised to pay it, within three years before the commencement of the suit, it would prevent the bar of the statute.

2. That if plaintiffs in procuring the carriage, acted as the agent of intestate, that the statute of three years did not apply, and that the suit was not barred by the statute; which charges the Court refused, and the plaintiff excepted.

The jury found a verdict for the defendants, and the Court rendered judgment accordingly, from which this writ of error is prosecuted.

The plaintiff assigns for error, the matters of law arising out of the bill of exceptions.

HOPKINS, for the plaintiff in error, cited 16 Johns. 277; 4 Cowen, 493; 8 Porter, 230; 3 Stewart, 288; Minor's Rep. 353.

CHILTON, contra, referred to 5 Wendell, 558; 3 ib. 397; 4 Cowen, 494; 11 Johns. 101.

ORMOND, J.—The case cited from 6 Johns. 277, certainly sustains the doctrine contended for by the counsel for the plaintiff in error, that a promise by one of several executors or administrators, will take a case out of the statute of limitations. That case however, is expressly overruled by the subsequent one of Forsyth v. Ganson, 5 Wend. 558, in which the former is denied to be law, and such is our opinion. Such was also the decision in the cases of Tulloch v. Dunn, Ryan & Moody, 416, and Atkins v. Tredgold, 2 Barn & Cress. 12.

Two statutes of limitation are in force in this State, applicable to parol contracts. The first, declares that all actions of

account, and upon the case, except actions for slander, and such as concern the trade of merchandize, between merchant and merchant, their factors or agents, shall be commenced within six years, &c. Aik. Dig. 270. A subsequent statute provides that "no action shall be brought to recover any money due by open account, after the expiration of three years from the accruing of the cause of action." Aik. Dig. 272.

This question has been before this Court in the cases of Maury's adm'rs v. Mason's adm'r, 8 Porter 230; and again in Shepard v. Wilkins, 1 Ala. Rep. 62, in both of which the Court attempted to define the term, *open account*. In the former it was held that an account was not necessarily open, because it was not stated or reduced to writing, if its terms were fixed and certain. In the latter, it was held that an open account is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many.

The account in this case was the price of a carriage, purchased and paid for by the plaintiffs, at the instance of the deceased, with the cost of the freight from New-York to New-Orleans. This is not an open account, according to either of the definitions cited. If there was no express promise to that effect, the law would imply a promise to pay the cost of the carriage, for which the plaintiffs became responsible, and actually paid, and the costs of transportation. The amount, therefore, which the deceased owed, was not dependant on any future liquidation or settlement between the parties, but followed as a legal consequence, from his authorising the purchase to be made on his account. In the language of the case just cited, there was no term of the contract open for adjustment, and it was therefore not an open account within the meaning of the statute, and the Court erred in not giving the second charge asked for.

It is, however, insisted by the counsel for the defendant in error, that if the Court erred in its charge, the cause will not be remanded, as the demurrer to the declaration should have been sustained.

It is true, that the cause will not be reversed, though the Court may have erred in its charge, if upon the entire record it is obvious, the plaintiff never can recover; but the objection which exists to this declaration, is not of that character. The

only objection to the declaration brought to our notice is, the discontinuance of one of the administrators. In *Williams & Ivey v. Sims*, 8 Porter, 579, we held that several joint executors were, at common law, considered but one person, and that in this State, under our statutes, all executors who have qualified as such, and reside within the State, must be joined in the action. It was also held that the statute authorising a discontinuance in the case of a joint obligor, not served with process, did not apply.

The decision referred to, was made in reference to executors; but in this State, and for the purposes of this inquiry, there is no difference between executors and administrators.

Although, therefore, the discontinuance of one of the adm'rs may be a discontinuance of the entire action, it is an objection which the defendant cannot avail himself of here, in this proceeding, and has only been looked to for the purpose of showing that it is not such an error as would entitle the defendant to judgment, notwithstanding the error committed by the Court in its charge to the jury.

Let the judgment be reversed, and the cause remanded, for further proceedings.

THE STATE v. LEA.

1. The charge on an affidavit before a justice of the peace that M H and P D W, took and *feloniously carried away* a certain hog, is in legal import, a charge of larceny, and may be alleged, in an indictment for perjury, as charging and intending to charge that the hog was *feloniously taken, stolen* and carried away.
2. When the affidavit upon the charge of perjury as founded, merely states the belief of the affiant, that a larceny has been committed, the assignment of the perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged had not committed the larceny; it is necessary, when the defendant only states his belief, to aver that the fact was otherwise, and that the defendant knew the contrary of what he swore.

Question reserved by the Circuit Court of Cherokee county.

THE defendant was indicted for the crime of perjury, and tried and convicted at the last fall circuit.

After the conviction, he moved in arrest of judgment, that the indictment was not sufficient in law to authorise the sentence, and the Circuit Court considering the question presented by the record as novel and difficult, reserved it for the consideration of the Supreme Court.

The indictment charges the perjury to have been committed in an affidavit made before a justice of the peace for Cherokee county, in these terms.

This day personally appeared before me, B. G. Pollard, an acting justice, &c. Wm. Lea, who after being duly sworn, saith on oath, [tha'] he does believe that Martin Hail and Pleasant D. Willmoth, some time in the year 1839, did take and feloniously carry away, a certain hog, belonging to the said Lea, contrary to law and the dignity of the State of Alabama.

After setting out the affidavit, the indictment proceeds thus: "he, the said William Lea, meaning and intending, and charging thereby, upon his oath aforesaid, so as aforesaid taken, that the said Martin Hail and the said Pleasant D. Willmoth, did on the day and year aforesaid, in the county aforesaid, feloniously steal, take and carry away, a certain hog, the property of the said William Lea." The assignment of the perjury is then made in these terms: "Whereas, in truth, and in fact, the said Martin Hail and the said Pleasant D. Willmoth, or either of them, did not at any time, in any year of our Lord, feloniously take, steal, and carry away, a hog, the property of the said Wm. Lea

And whereas, in truth and in fact, the said Martin Hail did not, either in the year of our Lord 1839, or in any other year of our Lord, feloniously take, steal, and carry away a hog, the property of the said Wm. Lea.

And whereas, in truth and in fact, the said Pleasant D. Willmoth did not, either in the year of our Lord, 1839, nor did he in any other year of our Lord, feloniously take, steal, and carry away a hog, the property of the said William Lea.

And whereas, in truth and in fact, the said Martin Hail and the said Pleasant D. Willmoth, did not, in the year of our Lord, 1839, nor did they in any other year of our Lord, feloniously take, steal, and carry away, a certain hog, the property of the said William Lea.

The formal parts of the indictment were not objected to.

MOORE, for the defendant, made two objections to the indictment.

1. That the *inuendo* was not properly laid, as the charge contained in the affidavit is, that the prosecutors took and *feloniously carried* away a hog, &c. and this does not import or mean that they *feloniously took, stole* and carried away.—*Rex v. Aylett*, 1 Term Rep. 70; 2 Russell, 543; 1 Sand. 243.

2. That the perjury is not well assigned, because the issue tendered is, that the prosecutors did not steal the hog, which might be true, and yet consist with the defendant's innocence. He did not swear that they stole the hog, but merely that he *believed* they took and feloniously carried it away. 2 Russell, 542; 2 Ch. C. L. 312; 4 Went. 231.

ATTORNEY GENERAL, contra,

GOLDTHWAITE, J.—The first question raised upon this indictment, is, whether the pleader was authorised to assume that the charge of taking and feloniously carrying away a certain hog of another, contained in the affidavit upon which the perjury is assigned, is legally equivalent to the assertion, that a larceny had been committed, or in other terms, that the defendant intended thereby to charge the prosecutor with feloniously taking, stealing and carrying away his hog.

We do not entertain the slightest doubt of the propriety of this *inuendo*. We are not to look for technical precision and accuracy, in the proceedings of the class of officers, before one of which the affidavit was taken, and when inapt or inartificial terms are used in their proceedings, common sense requires them to be construed according to their popular acceptance and meaning, unless they are connected with others, by which such a presumption is necessarily repelled. It ought not to be tolerated, that one shall excuse himself from the liability to either a civil or criminal prosecution, because his false or offensive language is not strictly technical.

The charge contained in the affidavit, in legal import, is a charge of larceny, and being so, it was perfectly correct to allege that such was the meaning and intention of the defendant. It does not differ from the ordinary case of speaking of another,

that he is a thief, which always has been held to support the *inuendo*, that the speaker thereby intended to make a charge of larceny.

2. The other question is one of more difficulty, and this difficulty arises from the fact, that whether the false oath is direct and positive, or is only the assertion of a belief, the evidence necessary to authorise a conviction for perjury, is very similar, and perhaps it is not going too far to say that it is identical.

But the identity of the evidence necessary to sustain the indictment, whether the perjury was committed in the one form or the other, is not the test by which the propriety of the averments is to be ascertained. The statute has declared that it shall be sufficient to set forth the substance of the offence charged on the defendant, and by what Court, or before whom the oath was taken, averring such Court, person or persons, to have competent authority to administer the same, together with the proper averment or averments, to falsify the matter or matters, wherever the perjury or perjuries is, or are assigned. Aikin's Digest, 118, § 22; and from this it may fairly be inferred, that it was intended that some specific averment, directly showing the falsity of the matter sworn to, should be made. If it were otherwise, the general assertion that the defendant falsely, corruptly and wilfully swore, might be considered as sufficient. But this was not sufficient at common law, and would be in direct opposition to the statute.

The object of the assignment then, is to apprise the defendant of the precise matter in which the perjury is said to consist, and in this connexion it apprises him with certainty of the exact point upon which he must be prepared. In this view, it becomes of the utmost importance that the assignment should precisely contradict the matter sworn to.

In the present case, the matter sworn to was not that the prosecutors committed a larceny, though the effect of the affidavit was to charge them with that crime, and thereby to commence a prosecution, but was, that the defendant *believed* they had committed such a crime. The averment in the indictment that no such crime was committed by them, does not show that the defendant swore falsely. In order for the assignment to produce this consequence, it should also have been averred that the defendant well knew the contrary of that of

which he stated, his belief to be true. Such are the most approved precedents. 2 Chitty, C. L. 312, 320; 4 Went. 231; Roscoe's Cr. Ev. 684; 2 Russ. 542.

We are compelled to resort to precedents as persuasive authority, in the absence of decision upon this point, but independent of them, we think it clear, from the reason of the thing, that the assignment should form an issue upon the precise matter sworn to.

In the case of the *King v. Perrott*, 2 M. & P. 379, the indictment was for obtaining money on false pretences, and the averment was, that the prisoner unlawfully, wickedly, knowingly, and designedly, did falsify, pretend, &c. it was held to be necessary, in addition to all this, to expressly aver, that the pretence made use of, was false and untrue. Lord Ellenborough then said, "every indictment ought to be so framed as to convey to the party charged, a certain knowledge of the crime imputed to him; and after comparing that case to a case of perjury, he proceeds, "the convenience also of mankind demands, and in furtherance of that convenience, it is a part of the duty of those who administer justice, to require that the charge should be specific, in order to give notice to the party, of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood."

The opinion just quoted, shows very clearly that the object of the assignment, in the case of perjury, is to apprise the defendant of the precise matter urged against him; but in this indictment, so far from that being done, it would almost seem to have been to advise him that the matter in issue was the innocence of the prosecutors, instead of his own guilt.

Our conclusion is, that the indictment is defective for want of a proper assignment of the perjury, and the judgment of the Circuit Court is reversed.

The case is remanded, in order that a new indictment may be preferred, and such other proceedings had, as are in conformity to law.

If the defendant is in custody, he will be detained until discharged by due course of law.

BENTLEY *et al.* v. WRIGHT.

1. Where a judgment is rendered by a justice of the peace for a sum exceeding fifty dollars, which is removed by appeal to a higher tribunal, the appellate Court should not, on motion, vacate the judgment, but the correct practice under the act of 1819, is to put the defendant to plead the want of jurisdiction in abatement.
2. Where a statement filed in an appeal case, describes a note of fifty dollars, it is not available on error, that the sum sought to be recovered was beyond the jurisdiction of the justice of the peace; *non constat* but the interest had been remitted.
3. A judgment *nunc pro tunc* may be entered or amended at a subsequent term, even without notice, if there is any order or memorandum of record to warrant it.

Writ of error to the Circuit Court of Tallapoosa.

This case was commenced before a justice of the peace, by the defendant in error, against Moses Bentley, Wiley Crawford and Salmon Washburn, for the recovery of a note of fifty dollars. A judgment was there rendered for the amount of the note, with one dollar for interest, besides costs. From that judgment, the defendants prosecuted an appeal, Crawford alone, entering into bond with John Hopkins, his surety.

At the first term of the Circuit Court, to which the case was returned, the defendants, by their attorney, moved the Court to reverse the judgment and dismiss the appeal, because the Justice of the Peace, had no jurisdiction; which motion was overruled.

The plaintiff then filed a statement on the note against all the defendants, and took a judgment by *nil dicit*, which was rendered against Crawford and Hopkins, the surety in the appeal bond.

At the next term, the plaintiff moved to amend his judgment *nunc pro tunc*, so far as to have it rendered against Bentley and Washburn, whose names were omitted in the original entry through mistake. Whereupon, an entry was made as follows:

“George W. Wright, *v.* Wiley Crawford, Moses Bentley,
Salmon Washburn.

"This day, came the plaintiff by attorney, and moved the Court to amend the judgment of last term. And it appearing to the Court, that at the last term, said plaintiff recovered a judgment against said defendants, on appeal, and that the names of said Washburn and Bentley, were omitted in the judgment, and that the judgment was not at that time entered against them.

"It is therefore considered by the Court, that said judgment be rendered now, as then against them, and John M. Hopkins, their security in the appeal bond. Therefore it is considered by the Court, that said plaintiff recover of said defendants aforesaid, the sum of fifty-four 33-100 dollars, the damages in the declaration mentioned, together with the costs in this behalf expended" &c.

T. CLAY, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—It is assigned for error: 1. That the amount in controversy, was beyond the jurisdiction of the Justice of the Peace, and his judgment therefore unauthorised.

2. The Circuit Court erred in overruling the motion to reverse the judgment of the Justice and dismiss the appeal.

3. The first judgment should not have been awarded, nor the second rendered *nunc pro tunc*.

4. The judgment is for too much damages.

5. The amended judgment was rendered without notice, and is informal, uncertain and insufficient.

1. & 2. It is perfectly clear, that the jurisdiction of Justices of the Peace cannot be exercised in cases in which the amount in controversy, exceeds fifty dollars. But the act of 1819, Aik. Dig. 261, enacts that, "in cases of appeals from judgments of Justices of the Peace, the Court before whom such appeal shall be brought, shall proceed to try the same according to the justice and equity of the case, without regarding any defect in the warrant, capias, summons, or other proceedings of the Justice of the Peace, before whom the case was tried." This statute is very liberal in its terms; while it inhibits the appellate Court from repudiating the appeal for any defect in the

proceedings of the primary Court, it secures to the parties a trial, in accordance with "justice and equity;" and if interpreted according to its obvious design and intention, will prevent the mistakes of Justices of the Peace from operating to the prejudice of litigants. *Harrison v. Donnelly*, 5 Porter's Rep. 213; *McCrary v. Smith*, 1 Ala. Rep. N. S. 157.

That the judgment of the Justice of the Peace was for a sum beyond his jurisdiction, cannot be controverted, but the act cited, is very explicit to show, that the Circuit Court should not have disposed of the case according to the defendants motion. The defendants however, had a plain remedy; they should have pleaded in abatement, that the suit was instituted before a tribunal having no jurisdiction of the case. This they failed to do, and thus impliedly admitted, that they had been brought before the proper Court.

The question whether the want of jurisdiction does not appear from the statement filed by the plaintiff in the Circuit Court, is not brought directly to our notice by the assignment of errors; but it may be as well to remark that the plaintiff merely declares for fifty dollars, so that that Court could not know, but that the interest had been remitted even before suit brought. This the plaintiff might do, according to previous decisions made here. *Nibbs, use, &c. v. Moody*, 5 Stewart & Porter's Rep. 198; *King v. Dougherty*, 2 Stewart Rep. 487.

3 & 4. From the cause of action disclosed in the statement, the plaintiff was certainly entitled to judgment, for the defendants had withdrawn their plea, and the sum demanded was certain, being ascertained by a promissory note. If there was an order for the first judgment shown by the record, or some written memorandum of the Court, it was entirely proper to perfect the entry at the succeeding term. This is a proceeding so well established in practice and approved by authority as not now to admit of controversy. If the judgment is rendered for a larger sum than was due for principal and interest, it can be here corrected, at the costs of the plaintiffs in error, but a calculation of interest will show that there is no material error in this respect.

5. It has been heretofore decided, that where there was a mistake in entering a judgment apparent from the record, it was competent to amend the judgment *nunc pro tunc*, at the

next succeeding term, without notice to the opposite party. *Fuqua and Hewitt v. Carriel and Martin*, Minor's Rep. 170; *Clemens v. Judson and Banks*, *ibid*, 395. In point of law a notice would avail nothing, since the motion could not be gainsayed.

It is certainly true, that the judgment is informal and untechnical, but we think it substantially sufficient. The names of all the parties in the Circuit Court are stated as a part of the entry, and the judgment is rendered against the defendants and the surety in the appeal bond. This was a final disposition of the case according to law, and the judgment is affirmed.

JORDAN, USE, &C. V. GARNETT.

1. On a contract for the sale of some slaves by S to G, the latter transferred to S, by endorsing his name thereon in blank, a note made by one R to J, but which had never been assigned by him to G. A suit being brought against G on his assignment, in the name of J, for the use of S—*Held*, First—that an irregular assignment like this, which did not convey the legal title, was not embraced by the statute of 1828, defining the liability of endorsers. Second.—That the liability created by the assignment was, that the assignor would pay the debt, if by the use of proper diligence it could not be obtained from the maker of the note. Third.—That what would constitute proper diligence, was a question of fact for the jury, under all the circumstances of the case, and that suit must be brought to the first term of the Court to which it could be brought after the maturity of the note, unless some valid reason, such as the insolvency of the party, &c. excused it.

Error to the County Court of Pickens.

THIS action was commenced in the Court below, by the plaintiff in error, against the defendant in error, on his indorsement of a note to one Green S. Stilwell, the note having been executed on the 1st January, 1836, by one Rezin Ridgeway, for the payment to the plaintiff, twelve months thereafter, of one thousand and eighty dollars. The declaration, which consists of seven counts, charges the transaction variously.

The first count charges the defendant as maker of a promi-

sory note, for the payment of one thousand and eighty dollars.

The second count charges that Ridgeway made a note payable to the plaintiff for one thousand and eighty dollars, and that afterwards, to wit, on the day and year aforesaid, the defendant indorsed his name on the back of the note, and delivered the same to the plaintiff, whereby he became liable to pay the same to the plaintiff, and being so liable, &c.

The third count charges as in the second count, that Ridgeway made a note payable to the plaintiff, and that afterwards, to wit, on the day, and at the place aforesaid, the defendant, in consideration that the plaintiff had before that time, to wit, on the day and year aforesaid, sold and delivered to the defendant, six negroe slaves, the said defendant signed and indorsed his name upon the back of the said note, and delivered the same to the plaintiff, and being liable to pay the same to the plaintiff, undertook, &c.

The fourth count is and also for that whereas, the said defendant, heretofore, to wit, on the 12th February, 1836, in consideration that the said plaintiff, Stilwell, had before then, sold and delivered to the said defendant, six slaves, the said defendant then and there made and delivered to the plaintiff, his promissory note, in manner following, to wit, the said defendant indorsed and delivered to the said plaintiff, Stilwell, a promissory note, made by Rezin Ridgway, dated 12th February, 1836, to wit, at &c., by which note the said Ridgway promised, on the 1st March, 1837, to pay William Jordan, jr. one thousand and eighty dollars, for value received, by reason whereof the said defendant became liable to pay the said plaintiff the said sum of money in the said note specified, according to the tenor and effect thereof.

The fifth count charges the making of the note by Ridgway to the plaintiff, as in the previous counts, and that the defendant, at to wit, &c. indorsed and delivered the said note to the plaintiff, and thereby appointed the same to be paid to the plaintiff and by said indorsement, guarantied and assumed the payment of the same to the plaintiff, and the plaintiff avers that the said Ridgway, though often requested to pay the same, to wit, when the same became due, and since, has failed and refused so to do, of all which, the defendant had notice, to wit, at &c. and the plaintiff avers that the said Ridgway was, when

the said note became due, and now is insolvent, of all which defendant had notice, to wit, at, &c.; by reason whereof, the said defendant became liable, &c.

The sixth and seventh, are the common counts in assumpsit.

To the first and the two last counts, the defendant pleaded the general issue, and demurred severally, to the second, third, fourth and fifth counts; which demurrer was sustained.

From a bill of exceptions taken on the trial of the issues in fact, it appears that the plaintiff offered in evidence, under the first count of his declaration, a note made by Rezin Ridgway, to the plaintiff, dated the 12th February, 1836, for the payment of one thousand and eighty dollars, on the 1st March, 1837, upon which note was indorsed, the name of James Garnett, the defendant, that being the only indorsement on the note, which being objected to by the defendant, the Court sustained the objection and excluded the note.

The plaintiff then proved the signatures of the defendant and Ridgway, to the note and indorsement in evidence, under the common counts, and also proved, that in the latter part of 1836, Stilwell sold to Garnett, a number of slaves, and that Garnett upon the sale, gave Stilwell the note above described, in consideration of the sale of the slaves, and indorsed the note to him. It was proved that some money was paid, but it did not appear that any thing was due for the slaves, beyond the amount of the note.

This being all the testimony, the Court charged the jury, that the plaintiff had the right to sue Garnett, as the indorser of the note, although Jordan had not indorsed the note to Garnett; that Garnett was not a co-promissor or maker of the note, and that in order to recover against the defendant, it was incumbent on the plaintiff to show that Ridgway had been sued to the first Court, after the note fell due, and to insolvency. That the only question in the case now was, whether the plaintiff could recover upon the count for goods sold; that the note could only be regarded as evidence of an indebtedness for the slaves, but that a promissory note could not entitle the plaintiff to recover under that count, unless he introduced other testimony to connect the note with the defendant, and show the consideration for which it was given.

The Court further charged the jury, that if they believed,

Jordan, use, &c. v. Garnett.

from the testimony, that Stilwell sold the defendant slaves, and that he had indorsed to the plaintiff the note sued on, in payment, that he could not recover on the common counts.

The plaintiff's counsel moved the Court to charge the jury, that if they believed the signature of Garnett, on the back of the note, to be genuine, and made for a valuable consideration, given to him by Stilwell, and that Garnett has not discharged the note, they must find for the plaintiff. That when the signature is proved, a promissory note is evidence, under the common money counts. That if the jury believe that Stilwell sold the defendant a number of slaves; that the defendant agreed to pay for them and has not done so, that the plaintiff is entitled to recover the value of the negroes in this action; which charges the Court refused to give—the plaintiff excepted.

The jury found a verdict for the defendant, and the Court rendered judgment thereon, from which this writ of error is prosecuted.

The assignments of error are,

1. Sustaining the demurrer to the declaration.
2. Excluding the note from the jury under the first count.
3. The charges given and refused.

CRABB & COCHRAN, for the plaintiff in error—contended, that the irregular indorser of a promissory note, not negotiable by the law merchant, is a co-maker. That when the consideration of the indorsement is for his benefit, he is liable upon his indorsement as an absolute undertaking to pay the amount of the note, or is at least, liable as guarantor, and cited, 8 Pick. 182; 13 Johns. 175; 14 *ibid.* 349; 3 Mass. 274; 4 *ib.* 258; 5 *ib.* 358; 7 *ib.* 233; 9 *ib.* 315; 11 *ib.* 436; 6 Conn. 315; 17 Wendell, 214.

PECK & CLARK, contra—maintained that this indorsement created a liability under the statute of this State, and that to recover, suit should have been brought against the maker of the note, to the first Court after the maturity of the note. 2 Porter, 312.

That if the indorsement was a guaranty, the suit should have been in the name of Stilwell to whom it was made.

That the indorser could not be liable as a maker, unless the

indorsement was made at the same time the note was executed, and upon the same consideration.

ORMOND, J.—The questions of law, arising on the pleadings and evidence in this case must be determined by the character of the contract on which the action is founded—the indorsement of the defendant.

The facts of the case are, that Stilwell, for whose use this suit is brought, sold to the defendant six slaves, and received from him in part payment a note, for one thousand and eighty dollars, made by one Ridgeway, to the plaintiff. The note was not due at the time, nor indorsed by the plaintiff, but was at the time of the transfer indorsed by the defendant in blank. What was the liability contracted by the defendant by his indorsement? The defendant's counsel, maintains that he was liable only as an indorser under the statute, of paper, not mercantile, whilst the plaintiff's counsel contends, that by the endorsement, he became either maker of the note or guarantor.

Previous to the passage of the act of 1828, endorsers of notes and bonds, were liable on their indorsements upon the principles of the law merchant, but this law being thought unsuited to that portion of our community, not engaged in commerce, the act referred to, was passed, by which it was provided, that the remedy on bills of exchange and promissory notes, payable in bank, should be governed by the rules of the law merchant. The 12th section then proceeds, "all other contracts in writing for the payment of money or property, or performance of any duty, of whatever nature, shall be assignable, *as heretofore*, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit: *Provided*, suit be brought to the first Court of the county where the maker resides, to which suit can be brought, and if he shall fail to sue the maker to the first Court as herein provided for, the indorser shall be discharged" &c. Aiken's Dig. 329.

It is perfectly clear, that the design of the Legislature in the passage of this act, was merely to simplify the remedy against indorsers of paper, not mercantile in its character, or payable in bank. This appears, not only from the language of the act, its obvious scope and design, but is expressly so stated

in the preamble. The intention was to provide for those cases of indorsements of paper, not mercantile in its character, where without the provisions of the act, the endorser would be liable to be sued, on demand of the maker and notice of non-payment. But in this case, if the act just cited, had never passed, the indorser, would not have been liable, according to the rules of the law merchant, as if the indorsement had been regularly made; it is therefore, neither within the letter or the scope and design of the statute of 1828, nor does it come within the mischief intended to be prevented.

What then was the obligation created by the indorsement of the name of the defendant on this note? We must presume that the parties intended something by the act, otherwise, the note would have been handed over to Stilwell, in the condition it was. That the defendant did not intend to bind himself as maker of the note, cannot be supposed. Had such been his intention, he would doubtless have written his name at the proper place to indicate such intention; nor is it more probable that Stilwell, would have permitted him to write his name on the back of the note, as evidence of his liability as maker. Neither is it a fair inference, that the indorsement was intended as a mere guaranty that the note would be paid at maturity; such would not have been the effect of a regular assignment of the paper; and we cannot, in the absence of proof, presume that the parties contemplated a greater liability than would be created by a regular assignment, if the title had been in the assignor.

But as the defendant certainly intended to bind himself to some extent, we think his undertaking was an affirmation or warranty that the note when due, could be collected by due diligence from the maker, and this, we understand, was the liability, at common law, in cases like this, as is satisfactorily shewn in the case of *Mackie's executors v. Davis*, 2 Wash. 219.

The Legislature of Virginia, had passed an act declaring choses in action assignable, and vesting the legal title in the assignee. The case cited, was the first attempt to recover of the assignor, suit having been brought against the maker of the note by the assignee, and the money not made. The Court held, that the assignee could maintain the action, not as a con-

sequence of the act authorising the assignee to sue in his own name, but upon common law principles. That the assignment of the note imported a debt, and as by the statute the assignee had authority to sue in his own name, it was his duty to bring suit against the maker. That the object of the law authorising the assignee to sue in his own name, was not intended to defeat the common law remedy, but merely to give the assignee a right which he had not at common law.

In *Bradley v. Phelps*, 2 Root's Rep. 325, in a case like the present, the Supreme Court of Connecticut, maintained the doctrine here laid down, and again explicitly affirmed it in the cases of *Huntington v. Harvey*, 4 Conn. 124, and *Wilton v. Scott*, ib. 527. The case cited by the plaintiffs counsel from 6 Conn. 315, does not at all militate against the principle here advanced. There, as in this case, the indorsement was irregular and blank, and the question before the Court, was not what the blank indorsement, unexplained imported, but whether it was not admissible to show by parol, what the contract of the parties really was; and it was held that such proof was admissible.

The cases referred to by the counsel for the plaintiff in error from New York and Massachusetts, do certainly, many of them, sustain the principle contended for by him. It is to be observed, however, that the statute of Anne, is in force in both of these States, and the decisions are founded on the supposed intention of the party, to enter into some contract, respecting the note on which the indorsement is found, as the irregular indorsement could not operate to charge the person making it as indorser; to prevent it from being entirely inoperative, they held it an agreement to be bound as maker or guarantor, according to the exigency of the case.

However proper such an inference may be in those States, for the reason given, we are satisfied that in this State, where a regular assignment of paper, not mercantile, imports a conditional liability only, to hold that an irregular assignment would create an absolute, or a larger liability, without proof that such was the intention of the parties, would in the large majority of cases, if not in all, be in direct contravention of the contract, the parties supposed they had made.

Our opinion, therefore, is that an irregular indorsement like

this, on paper not mercantile, is not provided for by the act of 1828; that the liability thereby created is, that the assignor is liable to pay the debt, if by the use of proper diligence it cannot be obtained from the maker. What would constitute such diligence, would be a question of fact for the jury, under all the circumstances of the case. In Virginia and Connecticut, it has been held that if no valid excuse exists, the maker must be sued to the first Court after the maturity of the note; and as such is the requisition of our statute, where the assignment is regular, such would doubtless be the proper rule here, unless some valid reason, such as the insolvency of the maker, excused it.

Such being the law of the contract between the parties, we come now to consider it in reference to the pleadings, the second, third, fourth and fifth counts having been demurred to.—These counts are all substantially defective.

The second is framed on the supposition that one who is privy to the consideration, and endorses the note at the time it is made, thereby becomes a co-maker. If that were conceded to be the law, it appears from the count itself, that the note was not indorsed at the time it was made, but at a subsequent time; nor is there any averment connecting the indorser with the consideration of the note or the original parties to it. The third is founded on the supposition that the contract evidenced by the indorsement, was an absolute undertaking to pay the note.

The fourth, charges that by the indorsement, the defendant became liable to pay the amount of the note to Stilwell. From this it appears that the legal title or right of action is not in the plaintiffs, but in Stilwell, for whose use the suit is brought.

The fifth, charges the making of the note, and the endorsement by the defendants, and alleges that the defendants thereby guaranteed the payment of the note at its maturity; that the maker did not, on demand, pay the note at its maturity, but was then, and is now, insolvent, of which the defendant had notice, &c.

From this brief review, it appears that all the counts were framed on a mistaken view of the contract between the parties, and do not show any legal liability on the part of the defendant.

Upon the trial of the issues in fact, the Court correctly excluded the note and endorsement from the jury. It was not ev-

idence under the first count, which charged the defendant as maker of the note, for the reasons already given; nor was it evidence under the common counts, because it imported no legal liability to the plaintiff in this action. It is not necessary to examine the charges of the Court, because no matter how erroneous they might be, they could not prejudice the plaintiff in this action.

The judgment is therefore affirmed.

THE MAYOR AND ALDERMEN OF THE CITY OF TUSKALOOSA V.
LACY, *et al.*

1. Oyer can not be craved of any writing, which is not the foundation of the action.
2. When the condition of a bond is to perform the duties of treasurer, under a certain ordinance of a city corporation, and the ordinance is not set out, breaches of the condition can not be shown, without averments of the specific duties required by the ordinance.
3. A bond, conditioned that the principal obligor shall perform the duties of treasurer, under an ordinance of the city of Tuscaloosa, it being shown that the only duties imposed by this ordinance, are in relation to the issuing of change bills, in violation of the statute, is void, and no action can be maintained on it.

Writ of error to the County Court of Tuscaloosa county.

DEBT upon bond. The declaration, after setting out the bond, proceeds thus to state the condition, and to assign breaches thereon.

The condition of this bond is such, that whereas the above bound William M. Lacy, has been appointed Treasurer of the Mayor and Aldermen of the City of Tuscaloosa, under an ordinance passed by the said Mayor and Aldermen of the City of Tuscaloosa, on the 19th day of February, 1838, authorising the issuance of small bills by the said corporation. Now, if the above bound William M. Lacy, shall well, truly and faithfully discharge all the duties required of him as such Treasurer, under said ordinance, then this obligation to be void, otherwise

to remain in full force. Yet the said William M. Lacy hath not well, truly and faithfully discharged all the duties required of him as such Treasurer, under such ordinance, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. And the said plaintiffs, according to the statutes in such cases, &c. assign the following breaches of said condition, to wit: That after the making of the said writing obligatory, to wit, on the — day of —, a large sum of money, to wit, the sum of 3,000 dollars, of the said plaintiffs, came to the hands, and was received by the said William M. Lacy, as Treasurer as aforesaid, to wit, in the county aforesaid, to be accounted for and paid over to the said plaintiffs, when he, [Lacy] should be thereunto afterwards requested; and although the said William M. Lacy hath been often requested by the said plaintiffs to account for and pay over to them the said monies so received as aforesaid, to wit, on the day and year last aforesaid, yet he hath wholly neglected and refused so to do, and still refuses.

And whereas, also, afterwards, to wit, in, &c. at, &c. another large sum of money, to wit, — dollars was received by the said William M. Lacy, as Treasurer as aforesaid, of the monies of the said plaintiffs, to be paid out and disbursed according to the order and direction of the said plaintiffs, yet the said William M. Lacy, regardless of his duty as Treasurer as aforesaid, although ordered by the said plaintiffs, to pay out certain sums of money to divers individuals, to wit, the sum of 3,000 dollars, has hitherto wholly neglected and refused so to do. Whereby, and for the breaches aforesaid, here assigned, an action hath accrued, &c.

The defendants appeared and craved oyer of the bond and condition, which is given them. They also craved oyer of the supposed ordinance named in the condition, and [as the record recites] it was read to them in the words and figures following, that is to say:

Whereas, it has appeared to the satisfaction of the Mayor and Aldermen of the City of Tuskaloosa, that small bills of a less denomination than one dollar, are essentially necessary for the public convenience. Therefore, for the sake of stopping the circulation of individual tickets, and supplying their place

with a better currency, and that the profits arising therefrom, should be applied to the benefit of the city:

1. *Be it therefore resolved*, That the Mayor be instructed to procure from Philadelphia the amount of ten thousand dollars, in notes of the denomination of 12 1-2, 25, 50 and 75 cents, of the following form:

"THE CITY IS PLEDGED.

The Mayor and Aldermen of the City of Tuscaloosa, will pay the bearer _____ cents, on demand, in notes of the Bank of the State of Alabama.

Tuscaloosa, _____, 18—.

Treas.

Mayor."

2. *Be it further resolved*, That it shall be the duty of the Mayor and Aldermen, to appoint a suitable person for Treasurer, whose duty it shall be to countersign the notes after being signed by the Mayor; to keep a correct account of all the notes issued, and be ready at any time to report to this board when called on, the amount of notes issued, and redeemed, and all other information relative to the notes above described.

3. *And be it further resolved*, That the said Treasurer, before entering upon the discharge of his duty, shall enter into bond with this corporation, in the amount of twenty thousand dollars, with such security as shall be approved of by the board, for the faithful performance of his duty, and that the books of the said Treasurer, shall be at all times subject to the examination of the Mayor and Aldermen.

4. *Be it further resolved*, That the Treasurer shall deposit in the Bank of the State of Alabama, as Treasurer, all monies received by him for notes of the corporation put in circulation, so as to have at all times, as much money in Bank, on deposit, as there is corporation tickets in circulation. Passed 19th February, 1838.

After reciting the ordinance, as above stated, the defendants demurred to the plaintiffs declaration, and the plaintiffs joined in the demurrer, after objecting to the oyer had of the ordinance of the corporation.

The Court sustained the demurrer, and rendered judgment for the defendants.

The plaintiffs prosecute this writ of error, and here assign that the County Court erred,

1. In permitting the defendants to have oyer of the ordinance set out in the demurrer.

2. In sustaining the demurrer.

PORTER, for the plaintiffs in error, cited 1 Chitty's Plead. 416, 418, 330, upon the oyer, and Faikney v. Raymons, 4 Burr, 2069; Given v. Driggs, 1 Caines, 450, on the merits of the bond.

PECK, contra, cited Aikin's Digest, 110, § 52, 53, as settling the question as to the illegality of the corporation ordinance.—But if this question is not properly raised by the craving of oyer, then he insisted that the declaration was defective in substance, as no sufficient breaches are assigned.

GOLDTHWAITE, J.—The ordinance of the corporation was not the subject of oyer in this case, because the action is on the bond, and it is of that alone the defendants were authorised to crave oyer. 1 Chitty's Plead. 416, 418. •

2. When, however, the ordinance is stricken from the demurrer, it remains as tendering an issue of law upon the validity of the declaration, and we think it very clear that no sufficient breach is assigned. The condition of the bond is, that inasmuch as the defendant, Lacy, had been appointed Treasurer, under a certain ordinance, he was to discharge the duties required of him under the said ordinance. Now, it nowhere appears from any part of the declaration, what were the duties imposed by this ordinance, which was in effect, the law of the condition of the bond.

The plaintiffs might have declared on the penal part of the bond, and thus have forced the defendants to crave oyer of its condition, but then they would have been met with a general plea of performance, which in effect would have compelled the plaintiffs to have assigned breaches, not upon the bond, because that refers to the ordinance as a part of its condition, but directly upon the ordinance. Plumer v. Ross, 5 Taunt. 386; 1 Saund. 117, note 1; Stothert v. Goodfellow, 1 N. & M. 262.

3. We might here rest this case, as the conclusion already arrived at, is sufficient to sustain the judgment of the Court be-

low, but as the main question has been very fully considered, we think it best to declare our opinion on that likewise.

If the ordinance of the corporation be as it is set out in this record, no recovery can be had on any bond entered into under it. And this for the very sufficient reason, that the condition of the bond involves a direct violation of a public statute.

The act of 1830, provides, if any person or persons, partnership or association of individuals, shall sign, seal or make any promissory note, bill of exchange, either foreign or domestic, or order drawn upon any person or persons, bill single or penal, for a less sum than three dollars, and issue and put forth the same as a change bill, or to make it subserve the common purposes of money, he, she or they, so offending, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon presentment or indictment, shall be fined in a sum not less than fifty, nor more than two hundred dollars, at the discretion of the jury, by which such offender or offenders may be tried. Aikin's Digest, 110, § 52.

The second section of the same act, also makes it highly penal to pass off, circulate, or aid in the circulation of any such note or instrument in writing.

It is true, that when this Digest was compiled, a previous act passed in 1818, was permitted to remain in the statute book, and that this provided that all such notes or bills under one dollar, should be deemed and taken to bear interest at the rate of one hundred per cent. per annum. *Ib.* 236, § 4.

It is unnecessary now to determine, whether this act is or is not repealed by the subsequent statute, for if it is conceded to be in force, it will only operate as an additional penalty upon those who actually emit such unlawful paper for circulation as money. Under no circumstances does it furnish any warrant to sustain a contract connected with the acts denounced, and intended to be punished by the act of 1830.

We deem it unnecessary to go into a minute examination of the duties imposed on the Treasurer by the ordinance of the corporation, because it is apparent on its face, that it provides for nothing but a violation of the then existing laws, and no bond or any other contract growing out of it, can be enforced.

The principle which must govern this case, has too often received the consideration of this Court, to require us now to

illustrate it by authority. *Meggison v. Hill & Holden*, 2 Stewart, 175. See, also, *Amory v. Merryweather*, 2 B. & C. 573.

The judgment of the County Court is affirmed.

THE HEIRS OF GRIFFIN v. GRIFFIN'S EX'R.

1. A petition under the act of 1822, by an executor or administrator, for an order to sell the real estate of his testator, or intestate, should particularly state which of the heirs are of age, and which are infants, or *femes covert*.
2. The Orphans' Court being authorised to direct the real estate of a testator or intestate to be sold "either for money, or on credit," it may order that it be sold for cash as to a part of the purchase, and on a credit as to the residue.

THIS was a proceeding in the Orphans' Court of Chambers, at the suit of an executor against the heirs of his testator, for the purpose of obtaining an order for the sale of the lands of the decedent. The petition after describing the land and alleging the insufficiency of the personal estate, to pay the debts of the testator, proceeds as follows: "He (petitioner) further represents that the heirs of the said testator are Rachel Waldroup, wife of Benjamin Waldroup, of Tallapoosa county, Alabama, Elizabeth Pemberton, wife of Joshua Pemberton, deceased, of Chambers county, Alabama, Polly Johnson, wife of Jesse Johnson, of the State of Tennessee, Peggy Ivy, wife of Charles Ivy, of Tennessee, and the heirs of Andy Griffin, deceased, son of said testator—names being Sarah Ann, Eliza, Raymoth and William Griffin—the residence of whom is unknown to your petitioner. Your petitioner, therefore, prays that your Honor will take such measures in the premises as to order a decree of the sale of said land, &c.

The Orphans' Court allowed the petition to be filed, and ordered "that Edward Croft be appointed guardian *ad litem* of the minor heirs of said testator, and that Elizabeth Pemberton and Rachael Waldroup be cited to appear here on the 2d Monday of October next, to answer said petition, and that publication be made," &c. "notifying the aforesaid non-resident heirs, and all other persons interested, to appear here on the

second Monday in October next, to answer said petition," &c.

An entry in the record recites, that Elizabeth Pemberton and the adult heirs of the testator, appeared by their attorneys, and that the infant heirs appeared by their guardian *ad litem*, and demurred to the petition, but their demurrer was overruled.

It further appears, that an affidavit was made, that one of the heirs, for whom no appearance was entered, had, previous to the filing of the petition, intermarried with James H. Gaylor.

The record nowhere discloses which of the heirs of the testator were infants, and for whom the guardian *ad litem* defended. The allegation in the petition being proved to the satisfaction of the Court, an order was made directing that the lands be sold, "one half for cash, and the remaining half on twelve months credit."

To revise the decree of the Orphans' Court, the heirs have prosecuted a writ of error to this Court.

T. CLAY, for the plaintiff in error.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—The act of 1822, under which this proceeding was instituted, enacts that it shall be lawful for an administrator of an intestate, or the executor of a testator who has no power by the will to sell real estate for the purpose of paying debts, &c. "to file a petition in the County Court of the county in which letters of administration, or letters testamentary have been granted, setting forth that the personal estate of his intestate or testator (as the case may be) is not sufficient for the payment of the just debts of such intestate or testator," &c. without a sale of the real estate, setting out and particularly describing in such petition the estate proposed to be sold, and the names of the heirs or devisees of such intestate or testator, and particularly stating which are of age, and which are infants, or *femes covert*. Aik. Dig. 180-1. This statute is explicit in declaring what must be stated in the petition, and if its terms are to be regarded as imperative, there can be no question, but the petition in the present case is strikingly defective. It does not pretend to state which of the heirs are infants, nor what is the condition of all the female heirs. But in the absence of any allegation as to the infancy of any of the heirs, the

Court assumes the fact that some of them are infants, without particularizing any, and appoints a guardian *ad litem*, for all who are in that predicament; and the guardian answers the petition for the infant heirs, without disclosing who they are.

The jurisdiction of the Orphans' Court in a case like the present, is founded upon a statute, and in order to the regularity of its proceedings, the requirements of the statute must be adhered to. Such was the opinion of this Court in Wiley, *et al.* v. White & Lesley, adm'rs, 2 Stewart's Rep. 331, a case, although to a great extent overruled, thus far has never been questioned. Under the principle stated, we think the petition is substantially defective, and that the Orphans' Court should have sustained the objection made to it, by the heirs who appeared. Whitaker v. Patton, *et al.* 1 Porter's Rep. 9.

The Orphan's Court being authorised to direct the real estate of an intestate or testator, to be sold, "either for money or on credit," (Aik. Dig. 181) it is clearly competent to decree that it be sold for cash, as to a part of the purchase money, and on a credit as to the residue.

Other questions are raised by the assignment of errors, but their consideration is not deemed necessary, either to a decision of this case, or to enable the parties to adjust the matters in controversy.

Our conclusion is, that the decree of the Orphans' Court must be reversed, and the cause remanded, that the defendant in error may obtain leave to amend his petition, if he think proper, and take such further steps as are consistent with law.

KINNEY v. MALLORY.

1. Where two statutes are so repugnant to each other that they can not stand together, the latter will repeal the former; but so far as they can consist together, they should be sustained, as the law does not favor a repeal by implication.
2. The replevy bond required by the 6th section of the act of 23d December 1837, "to explain and amend the law in relation to attachments," may be executed by a stranger.

Error to the Circuit Court of Mobile.

THIS was a suit commenced by attachment, in the Court below, by the plaintiff, against the defendant in error. The attachment which issued, was levied on four negroes, and the sheriff returned, they were replevied by Pendleton Jenkins. The replevin bond was executed by Jenkins, and five other persons, in the penal sum of fourteen hundred dollars, and payable to the plaintiff in attachment, with condition to deliver the negroes to satisfy such judgment as might be recovered in the suit so commenced by attachment.

The plaintiff having filed his declaration, the parties appeared by their attorneys, and the defendant moved the Court to quash the attachment, on the ground, that the bond given on suing out the attachment, was illegal; but the Court refused to quash, and permitted a new bond to be filed, to which the defendant excepted, and the cause being submitted to a jury, a verdict was found in favor of the plaintiff, and judgment was thereon rendered. The sheriff having returned upon the replevy bond, that he had demanded the slaves of the obligors, and that they had failed and refused to deliver them, an execution issued against them, which came to the sheriff's hands, and thereupon, Platt Stout, one of the obligors in the replevy bond, petitioned the Judge of the Circuit Court, setting forth all the proceedings in the cause, and alleging, that Pendleton Jenkins, the principal in the replevy bond, was not the agent, attorney, or factor of the defendant in attachment; that upon the execution of the bond, Jenkins received the slaves and carried them to another State, and prays that the execution which issued on the replevy bond, be superseded; upon which the Judge made

an order, granting the prayer of the petition, and afterwards, on motion of the petitioner, quashed the execution: from which, the plaintiff prayed an appeal to this Court, which was granted.

STEWART, for the plaintiff in error.

ORMOND, J.—The execution which issued on the replevy bond taken in this case, was quashed because in the opinion of the Court, it was not such as the law authorised to be taken.

To the proper understanding of this question, a brief account of the old law and the decisions upon it, is necessary.

The first attachment law, passed in 1807, authorised the defendant in attachment, to replevy the property attached by giving special bail and pleading to issue. Toul. Dig. 17, § 14. The act of 1818, provided, that when the property of an absconding debtor was attached, that it should not be replevied but by the execution of a bond, with condition to return the specific property attached, or to satisfy the judgment rendered against the defendant. Toul. Dig. 21. Whilst the law remained in this state, the cases of *Adkins v. Allen*, 1 Stewart 130; *Sartin & Rodgers v. Weir*, 3 Stewart & Porter, 421; *Cummins v. Gray*, 4 Stewart & Porter, 397, and *Small v. Franklin*, 2 Porter, 493, were decided, in which it was held, that the replevy bond, even in the case of an absconding debtor, was a mere bail bond; that it must be taken payable to the sheriff, and could only be executed by the defendant in the attachment, his agent, attorney or factor.

In 1833, a new compilation of the statute law was made by Mr. Aikin, in which the attachment law was remodelled, and considerable additions made to it. Aik. Dig. 37. By the 11th section, it was declared that the goods should remain in the custody of the officer, "unless the defendant, his or her agent, or attorney, or *some other person*, replevy the same by giving bond" &c. The condition of the bond was in substance, the same as required by the old law in cases of absconding debtors. The 13th section of the act, authorised the defendant in attachment, at any time before final judgment entered or writ of inquiry executed, to replevy the estate attached, on giving special bail.

No judicial construction was given to this law, but doubts having arisen upon the apparent contradiction of the 11th and 13th sections, and of the probable operations of the decisions made under the old law, the Legislature, on the 23d December, 1837, passed an act, the title of which, is to explain and amend the law in relation to attachments. The 6th section declares that hereafter no defendant in attachment, shall be permitted to replevy the property attached by giving special bail, but that "every defendant in attachment, his agent, or attorney" shall be permitted to do so, by giving a bond with condition to deliver the specific property attached in satisfaction of such judgment as may be rendered against the defendant in attachment, and that upon a refusal to deliver such property on demand of the proper officer, the bond shall have the force and effect of a judgment.

It was clearly not the intention of the Legislature to repeal the entire attachment law, as found in Aikin's Digest, by the act of 1837, and will therefore only be a repeal of the former when it is inconsistent with, or repugnant to it. The former law authorised a replevy by giving special bail; this act prohibits it, and is therefore a repeal. The former was silent as to whom the replevy bond was to be given; this act declares it shall be given to the plaintiff, and is to that extent, declaratory of the former. The act in the Digest, authorises the bond to be given by the "defendant, his agent, or *some other person*," and the last act omits the words *some other person*; is the omission to insert these words, a repeal of that portion of the act? The bond in this case, was made by persons who do not profess to be either the agents, or attorneys of the defendant, and was made payable to the plaintiff, and the precise question is, whether since the act of 1837, a stranger can execute a replevy bond in a suit commenced by attachment.

These statutes are both affirmative in their character, and as already observed, so far as they are repugnant to each other, the latter will repeal the former, but so far as both may consist together, they ought to be sustained. The law does not favor a repeal by implication, unless the repugnancy is very plain. *Warden v. Arell*, 2 Wash. 296; 6 Bac. Ab. 373, statute d. With these rules in view, we cannot say there is any repugnancy between these statutes in the particular now under ex-

amination. The object of the Legislature, does not appear to have been to repeal the 11th section of the law in Aikin's Dig. as the condition of the bond is the same in substance, in both acts. The apparent mischief of the old law, so far as it can be gathered from the law of 1837, was not the condition of the bond or the persons authorised to execute it, but the control which the 13th section of the act in Aik. Dig. was supposed to exert over the 11th section, which by the decisions of this Court was converted into a common bail bond.

The object of this portion of the act of 1837, being as we have seen, to affect the construction or legal operation of the bond when given, it is not inconsistent with, or repugnant to its provisions, that a class of persons, not named in the law, may also execute the bond, under the authority of a former law. At least we cannot, according to the established rules of construction, say, that the mere omission to name them in the last law, is a repeal of the former law. The question before the Legislature appearing to be, not who shall execute the bond, but what shall be its effect when executed.

Let the judgment be reversed, and the cause remanded.

STEWART V. FOWLER.

1. When the acknowledgment of a deed of trust, conveying personal property to a trustee, for the benefit of certain creditors, is made by the grantor, and the delivery is said to be acknowledged to the *cestui que trust*, instead of the trustee, it is a substantial compliance with the statute, and the deed is properly admitted to record on such an acknowledgment.
2. A grantor who has a resulting trust in the property conveyed, is not a competent witness for his grantee, in an action of trespass, although he is introduced only to prove the consideration of the deed.

Writ of error to the County Court of Morgan.

TRESPASS for taking and carrying away a slave. The defendant pleads not guilty, and justification.

The plaintiff introduced a deed of trust in evidence, by which

it appeared that Aaron Perry had conveyed the slave in controversy, to Malcajah D. Fowler, in trust to sell, for the purpose of paying certain liabilities of Perry, to John Fowler, James Teague and Francis M. Roby. No specific resulting trust is reserved to Perry by the deed.

The deed was admitted to record on this certificate:

"Personally appeared before me, Thomas Price, clerk of the County Court of Morgan county, Alabama, the above named Aaron Perry, who acknowledged that he signed, sealed and delivered the foregoing deed, on the day and year therein mentioned, to the aforesaid John Fowler, James Teague, and Francis M. Roby. Given, &c."

To the admission of the deed, thus certified *as a registered deed*, the defendant objected, but the Court overruled the objection, and the defendant excepted.

Perry, the grantor, was then introduced as a witness to prove the consideration of the deed; he was objected to by the defendant, and the objection being overruled, the defendant excepted.

It also appears by the bill of exceptions, that the defendant justified under certain executions against Perry, but they were excluded from the jury.

A verdict was found for the plaintiff, on which judgment was given. The defendant now assigns as error:

1. The admission of the deed as a *registered deed*.
2. The admission of Perry, the grantor, as a witness.

McCLUNG, for the plaintiff in error.

HOPKINS, contra, submitted the case without argument, upon briefs.

GOLDTHWAITE, J.—1. The first question raised by the assignment of errors is, whether the deed, given in evidence in this case, was properly admitted to record under the statute which requires the registration of deeds of trust within a limited period.

We think this question is similar to one decided in the case of *Bradford v. Dawson & Campbell*, 2 Ala. Rep. 203, where we considered that a substantial compliance with the requisitions of the statute, would be sufficient. It is true, that the acknowledgment was of a delivery of the deed to the *cestui que*

trust, and not to the trustee, who is the grantee named in the deed.

The delivery to the beneficiaries of the trust, we consider equivalent to a delivery to the grantee, and therefore, the deed was properly admitted to record; it follows then that there was no error in admitting the certificate, as proof of its registration.

2. The other question respecting the admission of the grantor, as a witness, to prove the consideration of the deed, although assigned as error, is not noticed in the brief submitted with the record, and if the case had been argued, and the counsel had then omitted to raise the question, we should not have examined it, but according to our course of practice have considered it as waived. As however, the case is submitted on the errors assigned, we do not feel warranted in considering the point as waived.

In general, the grantor, is not a competent witness to support the title of his grantee. *Hernance v. Vernay*, 6 Johns 5; *Pruit v. Lowry*, 1 Porter, 101; *Holman v. Arnett*, 4 Porter, 63. But with us he is held an indifferent witness, when the contest is between an attaching creditor and his own vendee. *McKenzie v. Hunt*, 1 Porter, 37; *Holman v. Arnett*, 4 Porter 63.

The case here presented is that of a grantor who has a resulting trust to the excess which shall remain after the application of the property conveyed, to the discharge of the debts secured by the deed of trust; he is therefore in effect called to support his own title.

Nor does the fact, that he was called only to prove the consideration of the deed, make such a distinction as to render him competent, because the effect of such testimony may be to sustain his resulting interest, as well as his grantee's title.

We think he was improperly admitted, and for this error, the judgment is reversed, and the cause remanded.

ELLIS V. DUNN, TAYLOR & CO.

1. Where the judgment recites, that there came a jury of good and lawful men, to-wit, ——— and eleven others, it will be intended that the case was tried by a competent jury.
2. If the jury return a verdict in favor of the plaintiff for a specific sum, and the judgment is, that the plaintiff "recover of said defendant the said sum of ——— dollars, so assessed as aforesaid," &c. the legal conclusion is, that the judgment is for the amount of the verdict.
3. Where there are several plaintiffs, and the jury find for the "plaintiff," the verdict will be regarded as a finding of the issue in favor of the "plaintiffs."

THE defendants in error declared against the plaintiff in the Circuit Court of Tallapoosa, for work and labor done, goods, wares and merchandize sold and delivered, &c. The cause was tried upon the general issue, and a judgment was rendered as follows: "This day, came the parties by their attornies; and thereupon, came a jury, of good and lawful men, to wit: ——— and eleven others, who being duly elected, empannelled, tried and sworn, well and truly to try the issue joined between the parties, upon their oaths, do say, they find for the plaintiff, and assess his damages at the sum of eighty dollars twenty-one and three-fourth cents. It is therefore considered by the Court, that the said plaintiffs recover of said defendant, the sum of said ——— dollars, so assessed as aforesaid, together with the costs in this behalf expended, for which execution may issue, &c."

To revise this judgment, the defendant prosecutes a writ of error to this Court.

HEYDENFELDT, for the plaintiff in error.

T. CLAY, for the defendant.

COLLIER, C. J.—It is objected to the judgment,

1. That the names of the jurors are not set out.
2. That the cause was tried by eleven jurors.
3. That it is for costs only; and
4. That the verdict does not find the entire issue for the plaintiff.

In *Foot v. Lawrence*, 1 Stewart's Rep. 483, the judgment entry recited that the parties came by their attornies, "and thereupon, also came a jury of good and lawful men, (stating the names of eleven persons only,) who being duly sworn," &c. The Court held, that the recording the names of the jurors was an act of supererogation, and that it would be intended from the recital, that the jury were "of good and lawful men," that there were twelve men, one of whose names was omitted by the clerk by mistake. But we are not left to mere inference in the present case, for it is expressly stated that there was ——— and eleven others, that is, eleven in addition to one whose name is not mentioned. The case cited, is then decisive of the two first objections.

The two last assignments, are alike untenable. The jury find a verdict for a precise sum, and the Court renders its judgment for "said sum of ——— dollars, so assessed as aforesaid." This, beyond all doubt, means the sum ascertained by the jury, and is quite as explicit as if it had been inserted in the blank. True, the jury do not say they find the issue in favor of the plaintiff, but they do say, "they find for the plaintiff, and assess his damages" &c. This is equivalent in meaning, to the most technical language in which the verdict could have been expressed; and we will intend the substitution of "plaintiff" for plaintiffs, to be a mere clerical mistake.

We have only to add, the judgment is affirmed.



HALL V. CHILTON & MCCAMPBELL.

1. The transfer of a note by the assignment of the payee jointly with one who is a stranger to the note, does not convey the legal title, and therefore not within the statute of 1828, to define the liability of endorsers, but is an affirmation or warranty that the note may be collected of the maker by due diligence. What would constitute such diligence, would be a question of fact, under all the circumstances of the case, for the jury.
2. A declaration on such an assignment in a suit against the assignors, which averred that when the note became due and payable, diligent search and enquiry was made after the maker in the county and State, which was his ordinary

place of residence, to present the note for payment, but that he could not be found, and that his place of residence was unknown to the plaintiffs, and that suit was commenced against him to the first Court to which he could be sued, but that he could not be found—held sufficient.

Error to the Circuit Court of Benton.

THIS was an action of assumpsit in the Court below, by the plaintiff in error, against the defendants in error.

The declaration, in substance alleges, that one Charles S. Lewis, on the 1st September, 1838, made his promissory note, by which he promised to pay to the defendant, R. R. Chilton, or bearer, five hundred and fifty dollars, on the first of January, 1840, with interest from the date. That afterwards Rezin R. Chilton, on the 12th February, 1839, by the style and description of R. R. Chilton & J. A. McCampbell, assigned the said note to the plaintiff. The plaintiff then avers, that when the note became due and payable, diligent search and inquiry was made after the said Charles S. Lewis, at, to wit, in the county and State, which was his ordinary place of residence, for presentment and payment, and that his place of residence was unknown to the plaintiffs.

He further avers that a suit was commenced on the note against Lewis, to the first Court to which suit could be brought, but that he was not found, of all which the defendants had notice, &c. whereby, &c.

There was also a count for money paid.

The defendants demurred to the first count of the declaration, which was sustained by the Court. No notice appears to have been taken of the second count, but judgment final was rendered against the plaintiffs, from which he prosecutes this writ, and assigns for error, the judgment of the Court on the demurrer.

WM. B. MARTIN, for the plaintiff in error.

ORMOND, J.—Since the passage of the act of 1828, declaring and defining the liability of assignors of instruments not mercantile in their character, the question has been several times before this Court, and several exceptions have been engrafted on the law, as necessarily growing out of it. Thus in *Woodcock v. Campbell*, 2 Porter 456, where the maker mov-

ed out of the State, after the transfer of the note, it was held, that to charge the assignor it was necessary to sue the maker in the State to which he removed.

In *Ivey v. Sanderson*, 6 Porter, 420, the maker resided beyond the limits of the State, at the time of the assignment, and this Court held, that no recovery could be had against the assignor without an effort to recover of the maker by suit, if, as appeared in that case, the maker was solvent—and that these facts were known to the assignee at the time of the assignment. The principle of this case was affirmed in the case of *Bristow & Roper v. Jones*, 1 Ala. Rep. 159.

The law as above stated, is applicable to those cases where there is a regular assignment, transferring the legal title to the instrument assigned. The assignment of the note in this case, as described in the declaration, was jointly made by the plaintiffs, but as Campbell was neither payee nor assignee of the note, he could not regularly assign it so as to convey the legal title either alone or jointly with the payee.

In the case of *Jordan v. Garnett*, at the present term, we considered, at some length, the effect of irregular assignments like the present, and we held that such an indorsement not conveying the legal title to the instrument, was not within the statute of 1828, but was an affirmation or warranty, that the note could be collected of the maker by due diligence—that what would constitute such diligence, would be a question of fact, to be determined by the jury, under all the circumstances of the case:—that by analogy, to the diligence required to charge an assignor under the statute, if no valid excuse existed, such as the insolvency of the maker or absence from the State, suit must be brought to the first term of the Court to which suit could be brought.

In this case, it does not appear, except by the venue, where the maker resided at the time of the assignment; nor does it appear where he lived at the time the suit was brought, but the declaration avers that when the note became due and payable, diligent search and inquiry was made after the maker, in the county and State, which was his ordinary place of residence, to present the note for payment, but that he could not be found, and that his place of residence was unknown to the plaintiffs. It is further averred, that a suit was commenced against him

to the first Court to which he could be sued, and that he was not found.

We are satisfied that this was sufficient diligence to entitle the plaintiff to recover. There was no necessity to present the note for payment, but diligent inquiry should have been made of the maker's residence, in order to the institution of a suit, if he resided within the State, unless entirely insolvent.

It results from what has been said, that upon proof of the allegations in the declaration, the plaintiff would be entitled to recover unless the defendants should show by proof, a different case from that stated in the declaration. Let the judgment be reversed and the cause remanded.

JEMISON V. COZENS.

1. When slaves have been levied on and discharged by the execution of a forthcoming bond under the statute, and they are not delivered to the sheriff pursuant to the condition of the bond, but that is returned forfeited, and thereupon an execution is issued on it against the principal and surety; upon which the surety delivers the slaves, which are afterwards released by the fiat of the Chancellor, on a bill filed by the wife of the defendant in execution, on proper security; this is no ground to the surety for restraining the plaintiff from making a levy on his property, to satisfy the execution issued on the forthcoming bond.
2. It is no defence to the surety in a forthcoming bond, that the property levied on does not belong to the principal.
3. When property is levied on as belonging to the principal, and is claimed by another, the plaintiff may lawfully proceed to have satisfaction, by causing another levy to be made on the property of the surety, and this right is declared by statute.

Appeal from the Court of Chancery for the fifth District of the Northern Division.

The bill alleges, that Cozens, on the 6th August, 1839, procured an attachment at his own suit, to be levied on certain slaves, as the property of one Calhoun, and having afterwards, in March, 1841, recovered judgment on the attachment, he caused an order of sale or execution to be issued. This was plac-

ed in the hands of the sheriff of Tuskaloosa county, on the 7th April, 1841, and he, by virtue of it, seized and took the slaves into his possession; whereupon, the said Calhoun replevied the property by executing a forthcoming bond, conditioned to deliver the slaves on the 1st Monday of June, thereafter. To this bond, the complainant was Calhoun's surety.

The slaves were not delivered to the sheriff on the 1st Monday of June, as required by the condition of the bond, which was consequently returned forfeited: and afterwards, an execution was issued against Calhoun, and also against the complainant, as his surety.

On the 21st June, the complainant delivered the slaves to the sheriff, who levied the execution that issued on the bond upon the slaves, and advertised them for sale. It is also alleged that these slaves are of sufficient value to satisfy the execution.

The bill then alleges that Mrs. Calhoun, the wife of the defendant in execution, commenced proceedings by bill in equity, against Cozens, asserting that the slaves levied on were her sole and separate estate, and not in any manner, liable to the debts of her husband, and prayed an injunction to restrain Cozens from selling them under his execution. It also alleges that proceedings were had on this suit; that an injunction was allowed by the Chancellor, upon the execution of a bond payable to Cozens, and conditioned in conformity with the fiat, which, however, is not set out.

The bill asserts that Cozens has instructed the sheriff to seize property belonging to the complainant, and to sell the same in satisfaction of the same execution, which the complainant believes the sheriff will do, unless restrained by injunction, which is prayed for.

The injunction was awarded and the defendant demurred to the bill. The Chancellor sustained the demurrer and dismissed the bill. From this decree the complainant, appealed and here insists that it is erroneous.

PECK, for the plaintiff in error, made two points:

1. That by delivering the property to the sheriff on the execution issued on the forthcoming bond, the complainant is entitled

in equity, to a discharge from the legal penalty of the bond. *Roberts v. Henry*, 2 Stewart, 42; *Laughlin v. Ferguson*, 6 Dana, 111.

2. That the levy by the sheriff on the property named in the bill being sufficient to satisfy the execution, operates as a discharge of the execution until it is determined finally that the property is not liable to be sold under the levy. *Hoyt v. Hudson*, 12 John 207; 1 Cowen 47 note, *a*; *Clark v. Withers*, 2 Ld. Raymond, 1072; *ex parte Lawrence*, 4 Cowen, 417.

W. B. MARTIN, *contra*, contended, that the forfeiture of the condition of the bond, gave to Cozens an absolute right to pursue the complainant, which right could only be satisfied by payment of the amount of the execution. This right being given by statute, cannot be taken away in consequence of any hardship which may be supposed to result to the security. *Aiken's Digest*, 171, § 64; *Sadler v. Glover*, 5 Dana, 551; *Syms v. Montague*, 4 H. & M. 180.

Another reason why the subsequent delivery even of the same property, ought not to discharge the surety is, that the lien of the execution is discharged by the forfeiture of the bond, and other liens may have attached, or rights accrued, which the plaintiff in execution ought not to be compelled to litigate. *Lusk v. Ramsay*, 3 Mun. 417.

The levy of the sheriff having been released by the order of a competent tribunal, is, so far as the complainant is concerned, as if it had never been. This makes a distinction, which renders it necessary to examine how far a levy is a satisfaction, when it produces nothing to the plaintiff in execution.

GOLDTHWAITE, J.—The first position assumed by this bill, is that the condition of the forthcoming bond, was substantially complied with when the slaves were delivered to the sheriff, although this delivery was on a day subsequent to that stipulated.

This would be tenable, if the bond in this case had been entered into in consequence of any agreement between the parties, but it ceases to be so, when we consider the bond as imposed on the plaintiff in execution by statute, and that he is never consulted with respect to its execution. Indeed, in most cases, the effect of taking such a bond, is to delay the plaintiff

in the collection of his debt, and no security additional to what he had before is given him. This will be evident, when it is considered that the plaintiff in execution has procured a levy to be made by which his money is secured, and this levy though not released or discharged by the taking of the bond, may be, and possibly is, by its forfeiture. *McRae v. McLean*, 3 Porter 138; *Lusk v. Ramsay*, 3 Mun. 417. The plaintiff therefore, is placed in the condition in which he can receive no possible benefit, if the condition of the obligation is complied with, because the property then stands in the hands of the sheriff, in the precise condition that it was in when his possession was divested by the execution of the bond.

These considerations, very possibly induced the peculiar legislation on this subject, which authorises an execution to issue against principal and security, whenever the condition of the bond is not complied with, and that too, for the amount of the debt, without any reference to the value of the property levied on. *Aikin's Digest*, 171, §'s 64 & 66.

The statute declares that when the bond is forfeited and so returned to the proper officer, it shall be the duty of the clerk to issue execution thereon against all the obligors, and that gives to the plaintiff the same right to proceed against the sureties, as if he had obtained a judgment.

If a Court of Equity is authorised to consider time as immaterial in this particular instance, it might well be doubted if the statute would not be rendered inoperative, because no line can then be drawn which would show, with precision, the period when the right of the plaintiff became absolute. But, independent of this, it is very questionable whether the lien of the execution is not discharged by the forfeiture of the bond, so that the property previously levied on would be subject to any other lien and might also be changed by sale. This was held in the case of *Lusk v. Ramsay*, and seems to be inferable from that decided in this Court of *McRae v. McLane*, before cited.

These reasons lead us to the conclusion that it is no ground for relief in equity, that the property was delivered at a subsequent period than the day mentioned in the bond.

2. Most intimately connected with this ground of defence, is the other, asserted in the bill, which, without asserting that

the property belongs to Mrs. Calhoun, evidently was intended to furnish a foundation for such an inference.

If it was admitted that such was the state of the title, we think it affords no reason for equitable interposition, unless the levy was contrived in fraud, with a knowledge on the part of the plaintiff at law, and with the intention of inducing some one to become bound as security. And even in such a case, if the knowledge of the state of the title came to the security previous to the day appointed for the delivery of the property, it may be considered as very questionable whether such a defence could be urged, because the property could be delivered and a claim interposed on the day of sale.

In Virginia, where a statute very similar to our own, is in force, it has been decided, it is no ground for relieving either the principal or sureties to a forthcoming bond, that the former was not the owner of the property specified therein. *Syme v. Montague*, 4 H. & M. 180.

The reason for the decision, and it seems to be conclusive, is, that the obligors to the bond are estopped, so long as it remains in force, from setting up an adversary title in another. We have been referred to the case of *Laughlin v. Ferguson*, 6 Dana, 111, in which a different conclusion is supposed to be arrived at by the Court of Appeals of Kentucky, under a similar statute; but we find the question was not decided, though such is evidently the impression of the Judge delivering the opinion of the Court. The judgment is given on another ground, and we are not permitted to give the same weight to a casual expression, as is due to a deliberate decision. Indeed the whole current of authority in that Court is adverse to such a defence. In the case of *Sadler v. Glover*, 5 Dana, 551, the bond was for the delivery of a horse, saddle and martingale; the horse was offered to be delivered and was afterwards sold by the debtor, for fifty dollars. The judgment was for two hundred dollars, besides interest and costs. It was held that relief could not be had, and it was said if the levy had been alone on the saddle and martingale, the omission to deliver them would make the surety responsible for the whole debt; therefore he was so as the case stood. To the same effect is the case of *Syme v. Montague*, before cited, where the Court say whether the pro-

perty was worth much or little, the not producing it, subjected the sureties to the payment of the whole debt.

It is possible there may be cases of fraud or mistake in which a Court of Equity would be authorised to grant relief, but no such ground is laid in the present bill, nor is any excuse shown for not performing the condition of the bond. Under these circumstances, we perfectly agree with the Chancellor, that it would be a repeal of the statute, to grant relief on account of any merits which affect the condition of the bond.

3. On the other ground, that the surety is discharged in consequence of the subsequent levy, we think it entirely clear there ought to be no relief.

We do not deem it necessary to examine principles or authorities to ascertain whether a plaintiff in execution can be restrained from proceeding against a surety where the property of the principal sufficient, to satisfy the debt, has been levied on, because we think this aspect of the present case is within the equity even if it is not within the express letter of one of our statutes.

The 6th section of the act of 1828, Aikin's Digest, 170 § 60, provides, that proceedings for the trial of the right of property, shall in no case prevent the plaintiff from going on to make his money out of other property than that levied on and claimed, if it can be found. It is impossible to consider the proceedings by Mrs. Calhoun in any other respect than a claim of property, and it is only because of her peculiar condition, as a *feme covert*, whose husband is the defendant in the execution, that her bill in equity, seeking to ascertain and enforce her right can be supported; because otherwise, it would be cognizable at law.

We have already shown that the right of the plaintiff in execution, was complete against the complainant, so soon as the forthcoming bond was returned forfeited, and the levy made under the second execution, must be considered as an original, to all intents and purposes. It is then the same to the plaintiff if a claim is interposed to this property, as it would be if any other estate had been levied on, and then claimed by some other person.

The decree of the Chancellor is affirmed, with costs.

NOLLEY V. HOLMES.

1. The entries made by a tradesman, in his book of accounts, are not admissible in his favor, although it is shown by the testimony of other witnesses that his books were correctly and accurately kept.

THE plaintiff in error declared against the defendant in the Circuit Court of Baldwin, for goods, wares and merchandize, sold and delivered.

On the trial, the plaintiff proved that he was a merchant, and that he had no clerk, but sold goods himself. He then produced his day book and ledger, kept by himself, in which the defendant appeared to be charged with merchandize sold by the plaintiff, to the amount of one hundred and sixty-nine dollars. It was proved that the charges were reasonable and proper; and persons who had dealt with the plaintiff testified, that he kept correct books, and his accounts were fair. The defendant moved the Court to exclude the plaintiff's books from the jury as inadmissible evidence, which motion was sustained; and thereupon the plaintiff excepted.

A verdict and judgment being rendered in favor of the plaintiff, he has prosecuted a writ of error to this Court.

J. A. CAMPBELL, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—In *Moore v. Andrews & Brothers*, 5 Porter's Rep. 107, it was held, that the admissibility of books of account as evidence, was not provided for in this State by statute, and consequently depended upon the common law. This being the case, it may be safely affirmed, that entries made by a tradesman himself, stating the delivery of goods, are not evidence in his favor. 1 Phil. Ev. 266; 2 *ibid.* C. & H.'s notes, 691. The law cannot be admitted to be otherwise, without disregarding a very salutary maxim, *nemo debet esse testis in propria causa*; and this too, when the departure from a general rule, is not demanded by the necessity of the case. If a party has a good cause of action, he may call upon his adversary for

a discovery, if he has no other means of establishing it; but he cannot entitle himself to a judgment, by the proof of his own admissions, made either orally or in writing. That such would have been the effect of the admission of the evidence that was rejected, it requires no reasoning to show.

We are aware, that in most of the States, the party's books of original entries may be adduced as evidence; but this right is given by statutes which determine their influence, and prescribe what suppletory proof is necessary. 2 Phil. Ev. C. & H.'s notes, 682. No such statute being in force here, it follows from what we have said, that the judgment of the Circuit Court must be affirmed.

COOK & KORNEGAY v. DYER.

1. The statutes against usury were intended for the benefit of the borrower; they confer a personal privilege on him, which he may waive, and if he does, no one else can take advantage of them.
2. D held a deed of trust of C, on land and slaves, more than sufficient to satisfy a debt due from C, but consisting entirely of usurious interest. C & K had also a deed of trust on the same property, to secure to them a debt due from C, but subsequent in point of time to the deed of D. By an arrangement entered into by all the parties, C & K accepted a bill of exchange drawn on them by C in favor of D, on condition that D should enter satisfaction on the record of his deed of trust, which he accordingly did; and C & K sold the property conveyed thereby, and appropriated it to the payment, in part, of their debt due from C—*Held*, that in a suit by D against C & K, on their acceptance, they could not set up the usury in the transaction between D & C, to defeat the action.

Error to the County Court of Tuskaloosa.

THIS was an action of assumpsit in the Court below, by the defendant against the plaintiffs in error, on an accepted bill of exchange, for two thousand eight hundred and sixty-four dollars and sixteen cents. The parties went to trial on issues taken on the pleas of *non assumpsit*, payment, set off and usury.

Upon the trial, as appears from a bill of exceptions, the de-

defendants, to sustain the plea of usury, proved that the plaintiff had a large claim on one John C. Cabiness, secured by a deed of trust on land and slaves, and on the day the bill here sued on was drawn and accepted, a settlement took place between Cabiness and Dyer, when the former fell in debt to the latter, the amount of the bill; that the defendants also had a large claim against Cabiness, secured also by a deed of trust on the same land and slaves conveyed to secure the debt to Dyer, but this latter deed was junior, in point of time, to his. That it was arranged and agreed between all the parties, that the defendants should accept the bill sued on, and that Dyer should enter satisfaction of his deed of trust in the clerk's office, and upon his doing so, the defendants accepted the bill, the acknowledgment of satisfaction of his deed of trust, being the inducement to the acceptance. The property contained in the deed of trust, was more than sufficient to pay Dyer's debt, and came to the possession of the defendants, and was sold by them. It further appeared, that the debt, both of plaintiff and defendants, due from Cabiness, were usurious, and that the whole amount due from Cabiness to Dyer, on settlement, and for which the bill was drawn, consisted of unlawful interest, the principal having been all paid; but that Cabiness claimed no abatement from either party, on account of usury, but desired to settle the full amount of both debts.

Upon this testimony, the defendants asked the Court to charge the jury, that if they believed from the evidence, that the whole amount of said bill was for usury, at the rate of four per cent. per month, and that it was accepted by defendants for the accommodation of Cabiness, that then the plaintiff cannot recover in this action, which charge the Court gave, and further charged the jury, that if the acceptance was given in consideration that Dyer would enter satisfaction on his deed of trust on the property of Cabiness, that then defendants could not set up usury as a defence to this action. The Court charged further, that usury was a personal privilege, and that defendants could not take advantage of the usury between Dyer and Cabiness, in this action, unless the acceptance was an accommodation acceptance. To all which the defendants excepted.

The jury found a verdict for the plaintiff, and judgment be-

ing rendered thereon, this writ of error is prosecuted to reverse it.

The assignments of error are the charges given by the Court as set out in the bill of exceptions.

PECK & CLARKE, for plaintiffs in error, contended, that as the bill was drawn and accepted for a debt, consisting entirely of usurious interest, that no recovery could be had upon it.—That the taking of usurious interest was an indictable offence, and that no Court could sanction a recovery, when the receipt of the money would subject the party receiving it, to a criminal prosecution. They cited 2 Peters, 538.

HOPKINS, *contra*, insisted that the plaintiffs in error were not in a condition to raise the question of usury; that as between the parties to this suit, the consideration of the bill was lawful. That usury was a personal privilege, and as Cabiness waived the defence, no one else could make it. In support of these views, he cited 9 Mass. 45; 4 Esp. Rep. 11; 10 Johns. 204; 1 Bul. N. P. 224; 4 Dana, 181; Hardin's Rep. 82; 7 Peters, 111; 8 Term, 390; 5 Reports, 119, Whelpdale's case; 3 Reports, 436.

ORMOND, J.—The statutes of this State prohibit usury, and declare that the security by which it is reserved, shall be void for the entire interest, and that the principal only shall be recoverable. Aik. Dig. 655. A previous act authorised a *qui tam* action to recover both principal and interest, where usury had been taken, unless the borrower was the informer, when the whole amount went into the treasury. The same statute authorized and required the grand jury to present all persons guilty of usury, and if found guilty, they were to be fined in the amount lent or taken, contrary to the provisions of the act. Aik. Dig. 437.

It will be perceived from this statement of the statutes, that although the law against usury, has been greatly modified by the act first cited, making void the security by which illegal interest is reserved for the interest only, it is still a highly penal offence. In this case, however, we are to consider whether this contract evidenced by the bill sued on, and which is said to be composed entirely of illegal interest, is void, as between

these parties. The statute making void, not only the contract, but the security itself, by which illegal interest was reserved, was doubtless intended for the benefit of the borrower, he may, if he thinks proper, refuse to take the benefit it proffers to him, and pay the debt, and if he does, no one else can take advantage of it.

If the bill in this case had no connection whatever with the usurious transactions between Cabiness and the defendant, and the former had transferred it to the latter, in payment of a debt, consisting wholly of usury, no proposition can be clearer than that the acceptors could not avoid the payment on the ground that it was indorsed on a usurious consideration. Suppose further, that Cabiness had given the plaintiffs in error the money to pay this usurious debt, and that they had discharged it by accepting this bill, there would be no pretence for resisting the payment on the ground of usury, and yet that is in effect this case, unless a distinction can be shown between receiving property, which is afterwards converted into money, and receiving money in the first instance.

The cases cited by the counsel for the defendant in error, indeed, go much further than this, and establish the proposition, that where the suit is not brought on the instrument itself, by which the usury was reserved, but on one substituted for it to an innocent holder, that the defence cannot be made—that is the effect of the case cited from 8 Term Rep. 390. The case cited from 4 Dana, 181, is in principle, like this. There, a note secured by a deed of trust, was assigned on a usurious consideration, and a third person to gain a precedence for his own debt, secured by the same deed, endeavored to avoid the note for the usury in the transfer; but the Court refused to permit this to be done, on the ground that the statutes against usury were designed for the protection of the borrower, and that if he refused to avail himself of them, no one else could. See, also, the case of *Nichols v. Fearson*, 7 Peters, 111.

The case of *Bearce v. Barstow*, 9 Mass. Rep. 45, was a case in all respects like this, except that the defendant, instead of receiving property when he executed the note to pay the usurious debt of another, was indebted to the person whose usurious debt he thus became bound for. The Court held that the defence could not be made. The Court say it is nothing to the

defendant, to what use or purpose his creditor has disposed of the demand against him, which is liable to no objection of usury, and which being due from him, has been legally transferred, and made the consideration of the note in suit.

The case is as fully in point as the reasoning is conclusive of this case.

It is, however, supposed, that as the statute makes the offence of taking usury indictable, and as therefore the defendant in error upon the receipt of this money, would be liable to a criminal proceeding, that no Court will aid in its recovery.

If the question of usury could be tried in this case, there can be no doubt that the reasons stated would be conclusive against a recovery—but as there was no usurious contract between these parties, nor illegal interest reserved on the bill of exchange, and as it is not pretended that the transaction is a shift or device to evade the statute, the question cannot be presented to the Court. It is a matter *inter alios acta*, with which the present defendants have no concern, and cannot be permitted to volunteer a defence to the action which, the party interested declines making. The money in their hands for the payment of this bill, is the money of Cabiness. paid to them for this particular purpose; it is in effect therefore, the same as if it had been paid to the defendant in error. If, therefore, this defence were allowed, it would be permitting the plaintiffs in error to do indirectly what they could not do directly, as it is certain they have no right to the money, and it appears that Cabiness does not wish to avail himself of the protection afforded him by the statute.

A still more conclusive reason, if possible, will be found in the fact that the plaintiffs in error obtained possession of this fund, upon their promise to pay this debt, and to allow them now to withhold the payment, and retain the fund. would be to sanction the commission of a fraud.

Upon every view which we can take of this case, the judgment of the Court below is correct, and is therefore affirmed.

MILTON v. DEYAMPERT.

1. A blank endorsement imports a consideration, and can be given in evidence on the common counts.
2. When one places his name in blank upon the back of a note, negotiable and payable in Bank, although the note is not endorsed by the payee, the endorser thereby becomes bound to a similar extent as he would be by a perfect endorsement to another party to the note; and he may be charged by the payee, upon showing a demand upon the maker, and notice to the endorser, on the last day of grace.

Writ of error to the Circuit Court of Mobile county.

ASSUMPSIT. The declaration contained three special counts—the first and third, on a guaranty, and the second, on a promissory note. Also, a general count, for goods, wares, &c.—money lent and advanced, paid, had and received, and on an *insimul competassent*.

The case was submitted to a jury as on issue joined, and a verdict was returned, on which judgment was given for the plaintiff.

At the trial, the plaintiff produced and read in evidence, two promissory notes, each for the sum of fifteen hundred dollars, dated the 17th March, 1837, signed by Thomas Jenkins, payable to the plaintiff or order, and negotiable and payable at the Branch Bank of the State of Alabama at Mobile; one payable on the 1st day of June, and the other on the 1st day of July, 1837. Both notes had the names of the defendant and one G. W. Grant, written on the back and across the notes.

The plaintiff then proved the protest of the said notes for non payment, and notice thereof to the defendants. He also called a witness who testified that the defendant told him that he had indorsed the said notes as security for Jenkins, and had been indemnified by him.

There was no proof that Milton, the defendant, had ever entered into any agreement with the plaintiff, in relation to these notes; or that there had been any interview between him and the plaintiff, in relation to the notes, or to the indorsements made thereon.

On this state of facts, the Court charged the jury that this evidence, if true, was sufficient to sustain the action.

To this charge the defendant excepted, and now assigns it as error.

LESSESNE, for the plaintiff in error, cited Chitty on Bills, 14, 15; Nash v. Tilloe, 2 Henry Black. 319; Bullen v. Webb, 4 B. & C. 483; S. C. Eng. Com. L. Rep. 154.

STEWART, contra, cited Dean v. Hall, 17 Wend. 214; 5 Wheat. 277; 19 Pick. 260.

GOLDTHWAITE, J.—We have not considered it important to examine the special counts of the declaration in this case, to see whether the evidence was properly applicable to them, because, in our opinion, it was clearly admissible under the general count. The only objection urged against its application under this count, is, that no sufficient consideration is shown, moving from the plaintiff to the defendant. But with us, all written instruments for the payment of a debt, or for the performance of a duty, import a consideration, whether under seal or otherwise, and by statute, are declared to be evidence of the debt or duty for which they are given. Aikin's Digest, 283. Chamberlain v. Darrington, 4 Porter, 515.

2. This disposes of the case, unless we are to understand the plaintiff in error, as asserting that the evidence itself does not disclose any sufficient cause of action, to authorise the plaintiff to recover under any form of pleading.

We consider, however, that a perfect contract is evidenced by the note of Jenkins, with the name of the defendant written on and across its back, and the only matter to be ascertained, is the legal effect of this contract.

In the case of Jordan, for the use of Stillwell, v. Garnet, *supra*, in which a question, similar in many of its aspects, was presented, we held that one who placed his name on an assignable, as distinguished from a negotiable security, was not to be presumed to have taken on himself a greater liability, by such a blank signature as is here shown, than he would have incurred by a regular indorsement. The same rule must be applied to this case, but the legal result is somewhat different, and this arises from the fact, that in this case, the note is negotia-

ble and payable in bank; whilst in the other, it was assignable merely, but not negotiable.

This difference in the result of the application of the same rule, renders it necessary to explain the reasons for the distinction, and in order to do so with perspicuity, it is necessary to repeat some of the deductions which were then made, from the intrinsic evidence afforded by the paper indorsed.

The name of the defendant appears in immediate connexion with the written promise of another, which in this case is in the form of a promissory note, negotiable and payable at a bank, upon which an indorser, in the technical sense of that word, would become bound immediately and absolutely, upon the maker's default, provided it was regularly presented for payment, and due notice given to the indorser, of the neglect or refusal.

Finding his name in this connexion, we must conclude it was placed there for the purpose of evidencing a contract of some description; for we are not aware of any case where it has been decided that such a blank signature is entirely inoperative. What then is the precise character and extent of the engagement entered into by such a blank signature on the back of a contract, for the payment of money? It is entirely useless to transcribe, or even cite the great number of cases decided in other Courts upon this subject, because they are sufficiently numerous and variant, to give almost any response. *Dean v. Hall*, 17 Wend. 214, where many of these cases are collected.

In such a condition of adjudication, we are thrown upon principles, and it is evident that we must get our answer from the paper itself.

This, we think, shows conclusively that the defendant never signed it as maker, for the note was before him, and he did not put his name on its face. Hence we conclude, he did not intend to become bound as a co-maker. He places his name on the back of the note, but it was not necessary in that place to give any efficiency to the paper, and did not operate to assign it; his name then must either be discarded entirely, or held to evidence some contract collateral to the note; and in some manner connected with and dependent on it.

We say in some manner *connected with and dependent on the note*, because it is evident that a *perfect indorsement* does

not mean the same thing, or carry with it the same liabilities when found upon a note or bill negotiable and payable in bank, as it does when found upon a note which is not negotiable, but which is merely assignable under the statute. Therefore, when it is shown that perfect indorsements import different liabilities, according to the nature of the securities upon which they are found, it follows, necessarily, that the liabilities of imperfect indorsements must be referred to, and deduced from the securities on which they are found.

Indeed, when all of these engagements are construed to be collateral to the contract on which they are indorsed, and that the indorser thereby contracts that the maker of the security indorsed, will make the payment he has contracted to pay, we are furnished with a certain and never varying rule, which requires no modification, except that which is necessary to ascertain the condition upon which, and the period of time when, the collateral contract is to become absolute.

Whenever the security upon which the imperfect indorsement is written, may be the subject, either of assignment or indorsement, the imperfect indorsement must, in conformity with the rules we have thus ascertained, be governed by similar rules to those which are applicable to perfect indorsements, and a similar degree of diligence is necessary to charge one who becomes bound by an imperfect indorsement, as is necessary to charge an actual indorser.

We have shewn in the case of *Jordan v. Garrett*, that such a contract cannot be supposed to create a greater liability than a perfect indorsement, and to construe such engagements in any other manner, would leave the ignorant and unwary at the mercy of the designing; but with this construction, they will conform in most, if not in all cases, to the obvious intentions of the parties making and accepting them.

The cases must be exceedingly rare, if they exist at all, in which any one writes his name upon the back of any security, by which money or any other thing is promised to be paid, who does not distinctly understand that he thereby becomes bound as an indorser.

We have not been able to perceive that any other general rule can be deduced from elementary principles, capable of covering all cases in which imperfect indorsements may be made.

To hold them to be mere guarantys in the strict sense of the term, when found upon mercantile or assignable securities, would introduce the same evils which were intended to be obviated by our statutes, which define the liability of indorsers, and which create the distinction between mercantile and assignable securities. Although these statutes do not, in terms, apply to such cases as this, they evidently contemplate that only two classes of notes shall exist; one of which is strictly mercantile, as notes payable in bank, and bills of exchange; and the other not negotiable, but assignable merely. In both of these classes, the liability of an indorser is very clearly ascertained, and it seems to us that it would be highly prejudicial to the community, to introduce a class of indorsements, which would in each case be governed by rules dissimilar to those which obtain in either class, which the statutes contemplate. Our conclusion is, that the contract of the defendant in this case, though not an indorsement in the technical sense of that word, is to be governed by similar rules, and his liability was complete as soon as the maker made default, and notice was given of the refusal or neglect to pay.

We remark, that we do not wish to be considered as concluding the question, whether, under such an indorsement as this, the indorser might not be made liable, even if he was not notified according to the law merchant, if due diligence was otherwise shown; or if it was shown that no injury resulted to the defendant from the omission to give notice.

Let the judgment be affirmed.

CRENSHAW, GUARDIAN, &C. v. HARDY.

1. Upon the settlement, by the Orphans' Court, of the accounts of the guardian of a female ward who has married, the decree should be rendered in favor of the ward and her husband jointly.
2. Where an execution is unauthorised by the judgment, a *supersedeas* is the proper remedy, or when the Court, from which it issued, is in session, a motion to quash will be entertained.

UPON the settlement of the account of the plaintiff in error, as guardian of Susan Crenshaw, who had intermarried with the defendant, the Orphans' Court of Lowndes rendered a decree for the sum ascertained to be due against the plaintiff, in favor of the husband alone. About two years after the rendition of the decree, an order was made by the Orphans' Court, that the defendant in error have execution of the same.

To revise these proceedings, the guardian has sued a writ of error to this Court.

BOLING, for the plaintiff in error.

COOK, for the defendant.

COLLIER, C. J.—The wife must be joined with the husband in a suit for the recovery of a debt due to her before marriage, or wherever the cause of action would survive to her. *Huggins v. Durham*, 2 Strange's Rep. 726; *Gratz, et al. v. Phillips*, 1 Penn. Rep. 333; *Swan v. Guage*, 1 Hayw. Rep. 3; *Tucker v. Gordon*, 5 N. H. Rep. 564; *Clapp v. Inhabitants of Stoughton*, 10 Pick. Rep. 463. In the present case, it is true, that no formal suit was brought against the guardian, but without a citation, he came into Court and submitted his accounts for adjustment, yet the decree for the sum ascertained to be due, should have conformed to the liability; or in other words, should have been in favor of the parties who were entitled to sue. This conclusion would seem necessary to follow from the fact, that the decree is declared by statute, to have the force and effect of a judgment at law, and execution may issue thereon. That the sum adjudged to the husband, would have survived

to the wife, cannot be disputed, and hence it follows, that the decree is erroneous.

The objection that the Orphans' Court awarded an execution in favor of the husband, cannot be noticed on error. Such an order was supererogatory, the statute having declared the effect of the decree. Where an execution is unauthorised by the judgment, a *supersedas* is the proper remedy, or when the Court from which it issued is in session, a motion to quash will be entertained. *Nichols, et al. v. Wolfersberger*, 6 Sergeant & R. Rep. 167. The case of *McLeod v. Mason*, 5 Porter's Rep. 223, in this respect, is unlike the present—there, the order for an execution was regarded as a part of the decree.

Upon the first ground considered, the decree is reversed, and the cause remanded.

LYON V. ELLIOTT, ADM'R.

1. E desiring to foreclose a mortgage made to secure a note, held by her, applied by her counsel to L, for information, who pointed out to him the mortgage on the records of the County Court, and thereupon E filed a bill in the name of L, and others, to foreclose the mortgage. A decree being had, L became the purchaser, at the sale of the mortgaged premises; afterwards a reference was made to the master, to enquire, whether the mortgage had not been foreclosed previously; and upon the admission of L, that it had not, and that the note in the case, was the property of the estate of John Elliott, reported that fact, and that L was the purchaser at the sale; whereupon the sale was confirmed. L afterwards discovering that the mortgage had been previously foreclosed by him-self, and the property sold, refused to pay the purchase money; whereupon, at the instance of E, an attachment was directed to issue against L, to compel the payment of the purchase money.—*Held*, first that E was, by consent, a party to the record, otherwise, the presumption must be that L was himself entitled to the money and all the proceedings at the instance of E, void. 2. That although L was a complainant on the record, yet the fact being that the suit was instituted by E, for her own benefit, L must be considered on a motion to set aside the sale, as a stranger. 3. That under the facts of the case, the attachment should not have been awarded. 4. That as both parties were in fault, each should pay his own costs.

Appeal from the Chancery Court at Mobile.

Lyon v. Elliott, adm'r.

THIS was a bill filed by James G. Lyon, Joseph B. Earle, Samuel H. Garrow, and Henry Goldthwaite, to foreclose a mortgage against the heirs of S. V. V. Schuyler. The master having reported the amount of the debt, his report was confirmed, and a sale of the mortgaged premises directed to be made.

At the succeeding term, an order was made directing the master to inquire whether the note described in the report made by him, as the property of complainant, Lyon, is the same with one reported to belong to him in a previous case in this Court, and to pay which, property has been already sold.

The master reported that the bill had been improperly filed, and that the note upon which the decree and foreclosure was obtained in this case, was not a lien upon the land.

In the record is found the following letter from the complainant, Lyon, to the master, dated,

20th May, 1841.

"SIR—In the case to which you have alluded in your official notice, served upon me this morning, I have to observe, that I have no interest in the decree whatever. It should be alone for the benefit of Mr. Elliott's estate, *upon one note*; you will see, by examining the decree and sales previously made by you, that the particular lots in this case, have not been sold in any case of mine. I wish the sale made by you, confirmed, on my paying the purchase money—three hundred and thirty dollars.

"Elliott's estate held but one note, and that alone the decree should have been for, and so far as the decree goes to secure anything to me, where Mr. D. E. Hall is attorney, I hereby release it."

On the 21st May, 1841, an order was made, which recites that by consent, the order of reference taken on a former day of the term, is set aside, and the letter of Lyon to the Register, of the 20th May, 1841, ordered to be filed, and thereupon the master reported, that he had sold the premises described in the bill, and that James G. Lyon became the purchaser, for the sum of three hundred and thirty dollars, and by consent of parties, the report and sale was ordered to be confirmed; that Lyon pay the purchase money into Court, and on his making payment, the Register to make him a deed to the premises.

On the 15th November, following, a notice issued and was

served on Lyon, that a motion would be made for an attachment against him on behalf of Margaret Elliott, administratrix of John Elliott, deceased, to compel the payment of the sum of three hundred and thirty dollars, according to the terms of the preceding order, which is signed D. E. Hall, Sol. for Mrs. Elliott.

Upon this notice, an order was made against Lyon, to compel the payment of the money.

Then follows a sworn statement of Lyon, in substance, that the complainants sold to Schuyler, sundry lots of land, and took from him five several mortgages, which are numbered from one to five, and the amount specified, which each mortgage was intended to secure, by a description of the notes, amounts, &c. That upon a division of the proceeds of the sale, all the notes fell into his possession, except those in class numbered three; and that before the death of Schuyler, bills were filed and foreclosures obtained for his benefit in the classes numbered two, four and five, and the lots sold by the Register.

That D. E. Hall, Esq. called upon him for the mortgage, made to secure one of the notes held by Mrs. Elliott, that he either handed him the mortgage, or referred him to the clerk's office to get it—that Hall accordingly filed his bill, obtained a decree, and at the sale, he (Lyon,) became the purchaser, at three hundred and thirty-three dollars. That the matter so remained until the succeeding Chancery Court, when a reference was made to the master, to report something about the cause, and that believing at the time, that the decree had been obtained upon the proper mortgage, he addressed to the Register, the note set out previously in the record. That he should have paid the money, but that he was informed the property had been sold under another mortgage, and that in addition the property had also been mortgaged to the State Bank at Mobile, and that the Bank was not made a party. To prevent further trouble, he offers to pay the money, provided, the parties will transfer to him the note sued on in this case, and the mortgage numbered four.

Daniel E. Hall, makes affidavit, that some two or three years ago, he was employed by Margaret Elliot, administratrix of John Elliott, to file a bill to foreclose a mortgage on the note filed in the record. That from Lyon and others, he un-

derstood the transaction to be, that the complainants and John Elliott, purchased a tract of land, but before the deed was made, Elliott died. That to prevent any difficulty, the deed was taken in the name of the survivors, they, or some of them, agreeing to secure the interest of Elliott. That the survivors made sundry sales of the property, amongst which was the sale to Schuyler, secured by mortgage, and that the note on which this suit is founded, was delivered to the administratrix, as the proportion of the profits belonging to John Elliott. That Lyon informed him that the mortgage here foreclosed was given to secure the payment of the note, and that therefore he filed the bill. That it was not until after the decree that he learned that Lyon had previously filed a bill, and foreclosed the same mortgage, and that he was misled by the information received from Lyon.

The Chancellor determined that no sufficient reason had been given, why an attachment should not issue, and directed that unless the purchase money was paid within one month, that an attachment issue, &c.

From this decree, Lyon prayed an appeal, which was granted, on his entering into bond, &c. to be approved by the master. The bond was executed payable to Margaret Elliott, administratrix.

The appellant assigns for error,

1. The Court erred in making a decree in favor of Margaret Elliott, as she was no party to the proceeding.
2. In making a reference to ascertain Mrs. Elliott's interest.
3. In confirming the report of the master.
4. In issuing the attachment.
5. There is no allegation in the pleading to authorise the evidence.
6. The whole proceeding irregular as it regards Mrs. Elliott.

STEWART, for plaintiff in error.

CAMPBELL, contra, insisted that the appeal must be dismissed. 2 Ala. Rep. 158. That the Court is the vendor, and after payment of the money into Court, its application may be discussed. 2 Har. & Gill. 346.

ORMOND, J.—In the case of *Creighton v. Paine*, 2 Ala. Rep. we held, that in a controversy between the purchaser at a mortgage sale, and one claiming the property, it was improper to prosecute an appeal against the complainant, who was passive, but that it must be prosecuted against the actor, who, in that case, was the purchaser.

If the bill in this case, had disclosed, that the suit was instituted for the benefit of Mrs. Elliott, the question here raised would have been distinctly presented on the record, or it might have been presented by petition filed afterwards. But although the whole proceeding is certainly very irregular, we cannot understand the reference made, as it appears, by consent, for the purpose of ascertaining the interest of Mrs. Elliott, as any thing else than an admission of record, that the suit was prosecuted for the benefit of Mrs. Elliott as administratrix of John Elliott. She certainly is a most efficient actor in the cause, as it is on her motion that an attachment is issued. If this inference is not made, it will follow that every step taken in the cause, at her instance, and for her benefit, is irregular and void, as without this presumption, she is a stranger to the record. It would be a most extraordinary procedure if any attachment could issue at the instance of a stranger to the suit, to compel the payment of money to her, which, in contemplation of law, is in the hands of the person entitled to it.

Considering then, as we must do, Mrs. Elliott a party to the record, as she was doubtless considered by the Chancellor, we proceed to the consideration of the case, as disclosed by the record, which presents this state of facts.

The complainants, four in number, and one John Elliott, were purchasers of a tract of land, and in consequence of his death, and to avoid difficulty, took the title in their own names. The land was divided into lots and sold, a portion being bought by Schuyler, whose heirs are the defendants to the bill, and the note upon which this bill is predicated, was the share of Elliott. That the attorney of Mrs. Elliott applied to the plaintiff in error, who was one of the complainants, for information, who informed him that the mortgage foreclosed in this case, was taken to secure this note, and that thereupon he filed his bill.

At the sale by the master, the plaintiff in error, was the purchaser, but refused afterwards to pay the purchase money, al-

leging that the property had been perviously sold under another mortgage; and also, that there was an outstanding mortgage in favor of the Bank of the State of Alabama, which was not made a party to the bill.

These facts appear principally in the affidavit made by the plaintiff in error, and the counsel for the defendant in error on a motion for an attachment, and in resistance of it.

In *Littell v. Zuntz*, 2 Ala. Rep. 256, a question somewhat similar to this, was presented to this Court, in relation to opening the biddings at a mortgage sale. The Court then say that "the right to set aside a sale, made by order of a Court of Chancery, where a proper case is presented, must of necessity be an attribute of that Court, as the same power is exercised by a Court of law where its process has been abused, and the power of a Court of Chancery cannot be inferior."

The question presented to the Court in this case, is in effect, whether the sale made by the master was valid. It is admitted in the affidavit of the counsel for the defendant in error, that the plaintiff in error had previously foreclosed the mortgage in this case, it is therefore obvious that no right was acquired by the plaintiff in error by the purchase made under the foreclosure in this case.

A distinction in cases like the present, may exist between a purchase made by a stranger and one made by a party to the record, who must be presumed to be cognizant of the facts of the case, and might be concluded from denying it. However the law might be in such a case, here, although the purchaser is one of the complainants, it is shown that the suit was not instituted by him, nor for his benefit, and for all the purposes of this inquiry, he must be considered a stranger to the proceedings.

It is true, it is stated that upon application of the counsel of Mrs. Elliott, "he pointed out the said mortgage on the record of the Court, and led applicant to believe that it was a just, true and subsisting mortgage, and afterwards admitted the same in his letter to the register;" but it does not appear that this false information was fraudulently given. On the contrary, it is evident that it was an honest mistake, as is conclusively shown by his becoming the purchaser himself. Neither is the defendant in error free from blame—it was the duty of her coun-

sel to have been satisfied that he was proceeding on the right mortgage, a fact which could doubtless have been ascertained by proper diligence.

At law, giving false information, or even the assertion of a falsehood, unless coupled with fraud, will not be the foundation of an action, even where positive injury has been caused to another by it; and certainly, under the more enlarged and benignant principles of equity, it could not be tolerated that a mere false assertion, without fraud, should subject a party to a loss, especially in a case where the only injury inflicted thereby, is the delay and expense of another suit.

We are therefore of opinion that the attachment was improperly awarded, and the decree of the Chancellor, to that effect, must be reversed.

This is not considered a proper case for costs, as both parties seem to be equally in fault, each will therefore pay his own costs both in this Court, and the Court below.

BEENE V. THE CAHAWBA AND MARION RAIL ROAD COMPANY.

1. When the charter of a Rail Road Company directs that books of subscription shall be opened, and all persons are admitted to become members of the corporation, by subscribing for stock, the act of subscribing creates a contract with the corporation to pay for the shares subscribed, in the manner provided by the charter: and an action may be maintained to recover instalments called for by the corporation, notwithstanding another remedy may be given by the charter authorizing a sale of the stock, whenever it can be sold at the par value.
2. A corporation may maintain assumpsit upon a contract to take its stock at a specific price.
3. So, also, it may declare on a contract to take stock agreeably to the provisions of its charter; and to such a declaration the common counts may be added.
4. A declaration by a corporation on a contract to take and pay for stock by instalments, and which also states that the action is brought for the use of another, is not evidence that the stock sued for, has been transferred by the corporation.
5. Where the name of a corporation has been changed by an amendatory act, and suit is brought by it in its first name, it is not necessary that the corporation should show the amendatory act has been rejected by its stockholders.

6. Where suit is instituted by the plaintiff in a mistaken name, and the right name is carried into the declaration, with an averment that the defendant was served with process issued in the mistaken name, the variance between the writ and declaration can be pleaded in abatement, and the defect is not cured by the declaration.

Writ of error to the County Court of Dallas county.

THE *capias* describes the plaintiffs by the name of the Cahawba, Marion and Greensborough Rail Road Company, but they declare as "The Cahawba and Marion Rail Road Company, at whose suit, by the name of the Cahawba, Marion and Greensborough Rail Road Company, the defendant was served with process; and who sue for the use of Julius Snead, by attorney, &c."

The first count of the declaration states the incorporation of the plaintiffs by an act of the Legislature of this State on the 15th day of January, 1834, and then proceeds to allege that the defendant afterwards, on the 29th day of March, 1837, in consideration that the corporation, at his request, had admitted him to take twenty shares of the stock of the corporation, and to that extent to become a proprietor therein, he then and there promised and undertook to pay the corporation the sum of two thousand dollars, and agreed to pay the same on request.

The second count states that the defendant subscribed for twenty shares of the stock of the corporation, and thereby became a member of and a proprietor in the same, and did then and there promise that he would pay all assessments which should be legally assessed by the corporation, upon the said twenty shares, and then proceeds to allege, that on the 9th day of January, 1840, the said corporation legally assessed an instalment of five per cent. to be required of the stockholders on the amount of stock subscribed, and to be due and payable on the 1st day of March, 1840; which said assessment amounted to one hundred dollars on the shares subscribed by the defendant; of all which he had notice. There is also an averment, that at the time when this assessment became due and payable, the said stock could not be sold at par value, for the sum so due; nor could it be so sold at any time since that period; whereby, &c.

The third count states the incorporation of the plaintiffs, the

subscription of twenty shares by the defendant, whereby he promised the said plaintiffs to pay them all instalments which should be legally assessed on said shares, and alleges an assessment of five per cent. in the same manner as in the second count, but omitting the averment respecting the inability to sell the stock for par value.

The fourth count is a general one, for rail road stock sold by the plaintiffs to the defendant, and also containing the allegations of the common money counts, &c.

The defendant appeared, craved *oyer* of the *capias*, and pleaded in abatement, the issuance of the writ and declaration with respect to the name of the plaintiff. This plea was demurred to, and the Court sustained the demurrer.

The defendant then demurred to each count of the declaration. These demurrers were overruled. He then pleaded in bar, *non assumpsit*, *nul tiel corporation*, forfeiture of the charter by *non-user*, and the same by *mis-user*. Issues were joined on these pleas, and a verdict found for the plaintiffs, on which judgment was rendered.

At the trial, a bill of exceptions was taken by the defendant, from which it appears that the Court charged the jury that the declaration was no evidence of the transfer of the instalment or stock, to Julius Snead.

The defendant requested the Court to charge the jury,

1. That under the plaintiff's evidence of charter, to wit, an act of incorporation, approved the 18th January, 1834, and the amendment of said charter attaching the name of Greensborough to the corporate name, and extending the route of the road from Marion to Greensborough, they had no right to sue in this case, by the name used in the declaration, without proof that the amendment of 1839, was rejected by the stockholders of the corporation.

2. That under the acts of 1834 and 1839, together with all other amendatory acts, no suit can be maintained for an instalment on the stock of any member of the corporation.

3. That the books of subscription, and the call for instalments mentioned in the declaration, and made by the corporation, are no evidence of an express promise to pay the stock therein subscribed, or any instalment thereon ordered by authority of the corporation.

Beene v. The Cahawba and Marion Rail Road Company.

The book of subscription contained the names of the defendant and many other persons signed to an instrument of the following effect:

Cahawba, Dallas county, State of Alabama.

A book of subscriptions to the capital stock of the Cahawba and Marion Rail Road, opened on the 20th day of March, 1837, by order of the board of directors, assembled in the town of Cahawba on the 15th day of March, 1837, under the direction of James J. Craig, Richard C. Crocheron, Joseph Babcock and P. Walter Herbert.

The names were signed thus:

Date	Names	Number of shares	Total stock.
March 29,	Jesse Beene	20	2,000

The Court refused to give these charges, and thereupon the defendaut excepted, as well to the charges given as to those refused, and now prosecutes his writ of error.

All the questions decided in the County Court, are opened by the assignment of errors.

G. W. GAYLE, for the plaintiff in error, cited, as to the plea in abatement, 1 Chitty Plead. 383; 1 B. & P. 382.

As to the main question, Minor, 103; 1 Caines, 380; 9 Johns. 217; 14 ib. 244; 1 Caine's Cases in Error, 86; 6 Mass. 40; 8 ib. 138; 10 ib. 334; 14 ib. 286; 16 ib. 94; 5 S. & P. 17.

EDWARDS, contra.

GOLDTHWAITE, J.—1. The principal question presented in this case, is one of importance, from the connexion which many individuals have, or have had, with various plans of internal improvement, and other objects of enterprise, through the medium of private acts of incorporations, granted by authority from this State. It requires us to determine whether this corporation can compel payment from the defendant for certain shares said to have been subscribed by him in its stock. It is apparent, that an examination of the act of incorporation, to some extent, is necessary for the proper answer to this question.

The act was passed in January, 1834, and by its first section, directs and provides that Thomas Moring, as President, and twelve other gentlemen therein named, as directors, and

their associates and successors in office, shall be, and they thereby were made a body politic and corporate, by the name and style of the Cahawba and Marion Rail Road Company.— Power was given to the corporation to sue and be sued, to purchase, receive, hold, sell and convey real and personal estate, as natural persons; to pass such by-laws, rules and regulations, for the good government of the company, as to them should seem proper, and generally to exercise all powers, and to perform all acts, matters and things which they might deem necessary to carry into full and complete effect, the object of their incorporation. And the only restriction is, that their real and personal estate shall never exceed one million of dollars.

The second section provides that the President and Directors shall continue in office until the 1st January, 1835, and until their successors shall be elected and qualified; that they shall cause books to be opened at Cahawba and Marion, and at such other places as they may deem proper, for the subscription of stock, and shall give thirty days notice previous to opening such books, at the several places at which books are to be opened; and shall also publish the same in the Selma Free Press; and said books when opened, shall be kept open for the space of ten days, and may be opened from time to time, until a sufficient amount of stock shall be subscribed; which stock so subscribed shall be divided into shares of one hundred dollars each.

The third section, provides for the manner in which the election for President and Directors shall be held, after the subscription of stock; and also, that the stock shall be transferable on the books of the company; and that the holder shall be entitled to all the benefits, and subject to all the liabilities of an original stockholder.

The fourth section provides, that when the company shall have been organized, the President and Directors of the said company shall have power to borrow money, contract debts, and be contracted with upon the credit of the stock thereof, and to pledge real or personal estate, for the payment of their debts; it also provides that the President and Directors may require such instalments to be paid on the stock, as they may think best for the interest of the company; and on failure

of any stockholder to pay the amount due upon his, her or their stock, in pursuance of any call made by the President and Directors, as aforesaid, within sixty days after such call, they shall be authorised to sell said stock: *Provided*, the same can be sold at not less than par value, for the amount so due.

The remaining sections declare the object for which the corporation was created, which is the construction of a Rail Road from Cahawba, in Dallas county, to Marion, in Perry county.

It is urged by the counsel for the defendant, that the legislature intended that this corporation should have no other remedy against delinquent stockholders, than that which is given by the charter; and that they can be bound in no other manner, unless they have subjected themselves to be sued at common law, by an express promise.

We think a careful examination of the act of incorporation, will entirely disprove the first branch of this proposition. We cannot conceive that the legislature intended to confer the franchise contemplated on such as might associate together, without requiring from them something in return. The charter sedulously guards the public from the evils which might ensue from a monopoly by individuals, of the whole number of shares, by requiring notice to be given of the times and places for opening the books of subscription, and by requiring them to remain open for a certain number of days. On the persons subscribing, and on them alone, are the privileges conferred, and it would be unreasonable to conclude, that the act of subscription, gave to those subscribing, a chance of gain, without the possibility of loss; which would be the case if a subscriber could afterwards withhold the amount of his subscription with impunity. It will be seen from the fourth section, that the corporation has no power to sell the stock of a delinquent subscriber, unless it will bring the par value. Now it seems perfectly clear, that in those cases where nothing had been paid, that a sale could not be made, unless the unpaid share would sell for as much as one entirely clear; therefore, if this is the only remedy which the corporation has against its individual members, it never could be carried into successful operation, without voluntary contributions.

But, independent of the reasons which arise from the circumstance, that the corporation was opened to every one, to

become a stockholder, we think that several clauses of the act itself, point directly to a common liability of all the stockholders. Thus, that which provides for the transfer of stock, declares that the holder shall be entitled to all the benefits, and subjected to all the liabilities of an original stockholder.

Again, the company is authorised to borrow money and contract debts on the credit of its stock, and it seems to us that this power would never have been conferred, unless the stockholders were bound whenever this credit was acted on.

A different construction would leave the stockholders, who have *bona fide* advanced their money in aid of the enterprise, in a condition of great embarrassment, and also, in great danger of actual loss, from the mere refusal of their associates to proceed according to their engagements.

It may be admitted that no one can be bound to contribute to the expense of making this road in any other manner than by an express promise, and we can view the contract of the defendant in no other aspect. It will not be denied, if the defendant had signed an agreement, which, after reciting the charter, had furthermore contained a stipulation to take and pay for a certain number of shares, according to its provisions, that he would be thus bound, and the agreement which he has signed, is nothing more or less. It purports to be a book of subscriptions to the capital stock of the corporation, opened by the order of its President and Directors, and the defendant, by his voluntary act, subscribes for twenty shares. He acts with reference to a known law, which even the Courts are bound to recognize, in the same manner as a public act. Aikin's Digest. 283, § 139. And conforms to the very terms of the charter, which prescribes that books of subscription shall be opened.—The act of subscription thus made, is equivalent in every respect, to an express contract, and the terms prescribed in the charter, attach to it as effectually as if they had been written at length.

The cases cited from Massachusetts, admit that a member of a corporation may become bound by an express contract, to pay assessments, although an agreement to take shares in an incorporated association, will not be construed as such a contract. We are not aware of the terms contained in the statutes under which these decisions were made, but if similar to that

we have just considered, we feel constrained to declare the law to be, otherwise. Worcester Turnpike v. Williams, 5 Mass. 80; Andover and Medford Turnpike v. Gould, 6 ib. 40; New-Bedford and Bridgwater Turnpike v. Adams, 8 ib. 138. The principles we have laid down as governing this case, are sustained by numerous decisions, and we may remark, that none have been found, except those of Massachusetts, which held a different rule. *Duchess Manufacturing Co. v. Davis*, 14 John. 238; *Goshen Turnpike v. Hustin*, 9 John. 217; *Herkimer Manufacturing Co. v. Small*, 21 Wend. 273; *Instone v. Franklin Bridge Co.* 2 Bibb, 577; *Hagerstown Turnpike v. Creeger*, 5 H. & J. 122; *Bond v. Susquehannah Bridge Co.* 6 H. & J. 128; *Delaware and Schuylkill Co. v. Sansom*, 1 Binney, 70.

We proceed then to the application of the law thus ascertained, to the several points made in this case.

The first count is upon a general contract made by the defendant with the corporation to take and pay for a certain number of shares in its stock, at a specified price. We can perceive no fault in point of law in this count, inasmuch as the corporation is not precluded from making such a disposition, and it is amply warranted by its general powers. If the matter to be decided, was whether the evidence sustained the count, we might and probably should arrive at the conclusion that it was not supported.

The second and third counts are drawn with reference to the act of incorporation, and set out a contract between the parties, which has already been shewn to be properly deducible from the charter, and the subscription of shares by the defendant. The superfluous allegation that the stock could not be sold by the corporation at par value, does not vitiate the count which contains it. Both are free from valid objection, as is also the common count.

There was, therefore, no error in overruling the demurrers to the several counts.

Neither can we consider the declaration as defective in shewing for whose use the action was instituted. It contains no evidence whatever, that the stock of the defendant had ever been transferred to Snead.

The amendatory act of 1839, authorises the stockholders of

the corporation to change its name by the insertion of "Greensborough," and also to extend the road to the town of that name; but it was entirely unnecessary for the plaintiffs to show that the amendment (if such was the fact) was rejected by the stockholders.

What we have already said with respect to the principal question, necessarily determines that the other charges were properly refused.

There is one matter which we hitherto have omitted to notice, because its decision did not affect the general question.—We allude to the sustaining of the demurrer to the plea in abatement. A similar question was raised in *Findlay v. Pruitt*, 9 Porter, 195, and we then held that such a variance as this would defeat the action, if properly pleaded.

It is true, that Mr Chitty states the rule differently, but the cases to which he refers as authority, are cases in which the defendant was misnamed in the process.

If the name of the plaintiff can be thus changed, there is nothing to prevent the introduction of a different party to the record. *Willard v. Missani*, 1 Cowen, 37.

For this error, the judgment of the County Court must be reversed and remanded, if desired by the defendant in error.

HOLLOWAY v. WASHINGTON.

1. A *supersedeas* is not grantable to suspend or arrest an execution, upon an allegation which is not sustained by the record.
2. It is competent for a Court to correct, or set aside an entry at the term at which it was made, but this cannot be done at a subsequent term, upon a mere allegation that an improper entry had been made by the neglect or inadvertence of the clerk.

Writ of error to the County Court of Cherokee.

THE plaintiff in error brought an action of assumpsit against the defendant, on a promissory note, which was continued for

several terms. At the July term of the Court holden in 1840, it appears from the record, that the cause was continued, but at a subsequent day of the term, an entry was made, setting aside the continuance, and rendering a judgment by default against the defendant, for the amount of the note and interest. An execution having issued on that judgment, the defendant applied for a *supersedeas*, which was issued under an order of the Judge of the County Court. In his petition for the *supersedeas*, the defendant states, that at the regular call of the docket at the July term, 1840, the cause was continued in consequence of the absence of the plaintiff's attorney until the next succeeding term, and that after his attorney had left the Court, the continuance was set aside, and a judgment rendered against him. He alleges that he had an available defence to the action, which he has been prevented from making without fault on his part. In consideration of which he prays that the execution may be superseded, and the cause again placed on the docket. At the term of the Court to which the *supersedeas* was returnable, an entry was made, reciting, that it appeared to the satisfaction of the Court, that the judgment was entered by the misprision of the clerk at the previous term, and ordering that the same "be made null and void, that the *supersedeas* to the execution be made perpetual, and the defendant go hence, &c."

MOORE, for the plaintiff in error.

W. B. MARTIN, for the defendant.

COLLIER, C. J.—From any thing appearing to the contrary, by the entries made in the cause at the term the judgment was rendered, the continuance was fairly and regularly set aside. It is not pretended that the clerk was guilty of malversation in office, either in making that entry, or in entering the judgment consequent upon it. Every thing then appearing to be regular, the execution should not have been superseded.—*Fryer v. Austill*, 2 Stew't Rep. 119.

It was clearly competent for the Court to have set aside the order of continuance, or to have made any alteration or correction in its minutes, during the term at which they were

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made, but it had not this power at a subsequent term, upon a mere allegation that the clerk, through *neglect or inadvertence*, had made an improper entry; especially, where it appears that the act of the clerk was sanctioned by the Court. The order vacating the judgment and superseding the execution, cannot be sustained as a judgment *nunc pro tunc*, because there is nothing in the record to have authorised it. *Thompson v. Miller*, 2 Stew't Rep. 470; *Allen & Dean v. Bradford & Shotwell*, at this term.

Whether the defendant is remediless, or whether, if he has a substantial defence, which without fault on his part he has been prevented from making, he may not obtain relief in chancery, are questions not now before us, and we consequently decline considering them.

The judgment of the County Court vacating that previously rendered in favor of the plaintiff, and perpetuating the *superse-deas*, is reversed, and a judgment is to be here rendered, directing that the *supersedeas* be quashed.

TALIFERRO, ADMINISTRATOR *de bonis non* OF POLLY THOMPSON
v JOHN Y. BASSETT AND WIFE.

SAME v. ROBERT J. MANNING AND WIFE.

SAME v. JAMES MANNIG AND WIFE.

1. The Orphans' Courts of this State have not power to cite an executor or administrator to make settlement, unless he derives his appointment from the Court issuing the citation.
2. It must appear on the record, that the Court has jurisdiction.
3. The voluntary appearance of the party will not cure the defect.
4. An executor or administrator of an executor or administrator, cannot be sued at law, for the devastavit of the former executor or administrator; in such a case, resort must be had to a Court of Chancery.
5. Whether the sureties of an executor, are liable for assets remaining in specie, at his death, unadministered, and which pass into the hands of succeeding representatives of the estate—*Quere*.

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Error to the County Court of Madison.

THIS was a proceeding in the Orphans' Court of Madison county, by the defendants in error, and others, legatees of Asa Thompson, deceased, against the plaintiff in error, as administrator *de bonis non* of Polly Thompson, deceased, who was executrix of Asa Thompson.

The record shews, that in May, 1828, Polly Thompson applied to the Orphans' Court of Madison county, and obtained letters testamentary on the estate of Asa Thompson, deceased.

At May term, 1838, of the Orphans' Court of Madison, on motion of the defendants in error, and the other legatees of Asa Thompson, it was ordered, that Benjamin Taliaferro, administrator *de bonis non*, of Polly Thompson, with the will annexed, be cited to be and appear at this Court, and at this place, to-morrow, to shew cause why he shall not settle the administration of the said Polly, on the estate of the said Asa Thompson, deceased. Taliaferro having appeared in obedience to the citation, and filed his account, the Court appointed a time for the final settlement, and directed publication to be made.

At the time appointed, Taliaferro, the administrator *de bonis non*, appeared and settled the administration of Polly Thompson on the estate of Asa Thompson, deceased; which settlement, by consent of all parties interested therein, was ordered to be recorded, and thereupon the Judge of the County Court proceeded to render judgment in favor of each of the legatees, for their respective shares against the plaintiff in error, administrator, &c. of the goods and chattles of Polly Thompson in his hands not administered.

On the second Monday in January, 1840, on the application of the defendants in error, a citation issued to the plaintiff in error, "now of Marengo county," to appear on the second Monday of February next after, to shew cause why the applicants should not have judgment and execution against him for their distributive share of the balance due from him as administrator of the estate of the said Asa Thompson, deceased, on settlement of his said administration heretofore made.

Upon the return of this citation, the following order was made. This day came the parties, &c. &c. and said defen-

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dant, shewing no sufficient cause why execution shall not issue against him for said distributive share, &c. It is therefore considered by the Court, that said plaintiffs recover against defendants, said sum, &c., and that execution for the same be awarded, to be levied of the proper goods and chattels of the estate of the said Polly Thompson, in the hands of the said administrator to be administered.

Execution having issued accordingly, was returned by the sheriff of Marengo county, "no property of the estate of Polly Thompson, deceased, found in the hands of Benjamin Taliaferro, administrator of said estate."

From the judgment thus rendered, the administrator *de bonis non*, prosecutes this writ of error, and for causes of error, assigns,

1. The record shews that the plaintiff in error was the administrator *de bonis non*, with the will annexed of Polly Thompson, deceased, who was the executrix of Asa Thompson, and the Court had no power to take an account from him of the administration of Asa Thompson, by his executrix Polly Thompson.

2. The record does not shew that the plaintiff in error was appointed administrator *de bonis non*, with the will annexed of Polly Thompson, by the Court below, and therefore the said Court had no jurisdiction over him, or authority to take account or render the judgment against him, as found in the record.

3. The said Court erred in taking the account in favor of the defendants and rendering judgment in their favor because it had no jurisdiction of the plaintiff in error, or authority to take and settle the accounts with the plaintiff in error, or of what was due to the defendants in error.

4. The Court erred in rendering the decree of the 20th July, 1838, for want of jurisdiction.

5. In rendering the decree of the 10th February, 1840, for the same reason.

6. In rendering the last judgment or decree, because there was a previous judgment for the same distributive share.

7. Because the last judgment was against the plaintiff in his individual character.

8. Because the two judgments are inconsistent with each other.

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HOPKINS, for plaintiff in error—insisted, that unless the Orphans' Court of Madison, had appointed the plaintiff in error, *administrator de bonis non*, it had no jurisdiction to call upon him to settle an account, or to render judgment against him; and that this fact must appear affirmatively on the record, and that as the County Court was one of special and limited jurisdiction, the consent of the plaintiff in error, if that appeared, would not confer jurisdiction on the court; 4 Johns. Ch. 410; 2 Cowen, 401; 6 ib. 221, 224; Aik. Dig. 248, § 16, 17: ib. 182, § 27; ib. 252, § 37, 39, 40.

That the record shews that Polly Thompson, as executrix of Asa Thompson, deceased, wasted the assets of her testator—and that without a statute altering the common law, the plaintiff in error is not responsible for the devastavit. 2 Williams on Executors, 1064, 1235; and that the only remedy in such a case, is in chancery. 2 Ch. cases, 216; 2 W'ms on Ex. 1064, note.

If the Court had jurisdiction, it could not render such a decree as this. 1 Paige, 537; 5 Rand. Rep. 51, 76.

ROBINSON, contra—maintained that the Court had jurisdiction; that the statutes of this State, gave the Court plenary jurisdiction over this subject. That as the executrix of Asa Thompson, received her letters testamentary from the Orphans' Court of Madison, the Court had jurisdiction over the principal subject, and that would draw after it all incidents and accessories. But that at all events, the consent of the plaintiff in error, was a waiver of the irregularity, if any existed. He cited Aik. Dig. 248, § 16; 250, § 23; 2 Greenl. 75; 6 Mass. Rep. 390; Toller on Ex. 492; Burns Ec. Law, 427; 1 Paige Ch. 540; 1 Penn. Rep. 282; 2 Eng. Ec. Rep. 56, 60, 283, 323; 6 Cow. 224; 4 Johns. Ch. 410; 2 Bac. Ab. 172; 14 Wend. 48; 3 Porter, 58.

ORMOND, J.—The plaintiff in error is the administrator *de bonis non*, with the will annexed of Polly Thompson, who was executrix of Asa Thompson, deceased, and was cited to appear in the Orphans' Court of Madison county, at the instance of the heirs of Asa Thompson, to settle the administration of Polly Thompson, on the estate of Asa Thompson. He appeared voluntarily, as the record recites, and an account and

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settlement was made, and judgment rendered against him in favor of each of the heirs, to be levied of the goods and chattels of Polly Thompson, in his hands. It does not appear from the record, that the plaintiff in error was appointed by the Orphans' Court of Madison, and the first question is whether the Court had jurisdiction.

The power of the County Court in matters confided to its charge, is certainly plenary; it is nevertheless clear that it is a Court of special and limited jurisdiction, and can exercise no power which is not conferred on it by statute. By the grant of letters testamentary, or letters of administration, it acquires jurisdiction both over the subject and person, and may compel obedience to its mandates; but this is a power which no other County Court could exercise; from the nature of the case, it is exclusive, and such was evidently the intention of the legislature, in the various acts on this subject. Such has also been the interpretation of similar laws in other States as shown in the cases cited: see *Dakin v. Hudson*, 6 Cow. 224; *Seymour v. Seymour*, 4 Johns. Chan. 210.

As this is a Court of limited jurisdiction, every thing necessary to give the Court jurisdiction, should appear on the record; it must be shown affirmatively that the Court has power to act. Nor will it avail, that the party appeared voluntarily and submitted to the judgment of the Court. It is a doctrine well settled, that consent will not confer jurisdiction.

If however, the Court had jurisdiction by having appointed the plaintiff in error, this proceeding could not be sustained at common law; an executor or administrator of an executor or administrator could not be sued for a debt due from their testator or intestate, notwithstanding such executor or administrator may have wasted or converted the goods of the first testator or intestate, because the act of the executor or administrator, being a *devastavit*, was a *tort*, and there was no privity between them, and in such cases resort was had to a Court of chancery, which granted the relief that could not be obtained at law. *Price v. Morgan*, 2 Chan. Cases, 172; 2 Williams on Ex. 1234.

This defect has been remedied in England, by the passage of the acts of the 30 Ch. 2; and 4 and 5 William and Mary, which provide that such second executors or administrators

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shall be chargeable in the same manner as the first executor or administrator might have been. In this State, no statute corresponding to the English statutes just cited, has been passed, and the matter therefore stands as it did at common law.

The plaintiff in error, as *administrator de bonis non* of Polly Thompson, became entitled only to such portion of her personalty as remained in *specie*, unadministered by her former representative, of which although the record is silent, it must be presumed she had, and to the extent of the assets thus received by him, he is alone answerable. *Chamberlain, administrator v. Bates, administrator, 2 Porter, 550; Wernich v. McMurdo, 5 Rand. 51.* Whether any thing came to his hands, does not appear from the record, nor was he cited to settle his own administration of the estate of Polly Thompson, but to settle the administration of Polly Thompson, of the estate of Asa Thompson, and that was the settlement actually made; and for the amount for which she was found indebted to each of the heirs of Asa Thompson, judgment was rendered against him, to be satisfied from the goods of Polly Thompson, in his hands to be administered. At a subsequent term of the Court, a citation issued to him, to shew cause why the applicants should not have judgment and execution against him for their distributive share of the balance due from him *as administrator of the estate of Asa Thompson*, and upon the return thereof, judgment was recovered and execution directed to issue and be levied on the goods and chattels of Polly Thompson in his hands to be administered. This execution issued and was returned—*no property found.*

This statement shows very conclusively that the attempt here is to recover of the plaintiff in error for the devastavit of Polly Thompson, in the administration of the estate of Asa Thompson, which not being provided for by statute, can only be effected in chancery, where the liabilities of the successive representatives of Asa and Polly Thompson and of their sureties can be adjusted.

Although the estate of Polly Thompson is doubtless primarily liable for the effects of Asa Thompson, changed or converted by her during her executorship, it is very clear that the bond executed by her on obtaining letters testamentary must stand as a security for the effects so changed or converted by

her during her administration. Whether her sureties in the bond would also be responsible for the assets of Asa Thompson, which remained at her death, in specie unadministered, and which passed into the hands of the administrator *de bonis non* of Asa Thompson—or which may have come into the hands of the first executor of Polly Thompson, if one was appointed and qualified, it would not be proper now to anticipate: all these different persons, who at different times, had the administration of the estates of Asa and Polly Thompson, would be proper and necessary parties to the bill, if one is filed, that the relative rights and responsibilities of each might be adjusted in one suit.

Let the judgment of the Court below be reversed.

NORRIS v. MOORE.

1. N agreed to employ M to keep a grocery for him for twelve months, at the rate of twelve dollars a month; to furnish him provisions, liquors, &c., and agreed that N might pay him one dollar and fifty cents for each gallon of whiskey sold, and retain the surplus, instead of the wages agreed on.—*Held*, That while the contract was subsisting, N had no right to leave the employ of M, before the expiration of the twelve months, and that if he did, his right to compensation was gone.

Writ of error to the County Court of Cherokee county.

COVENANT upon a contract under seal, by which the defendant agreed to employ the plaintiff, for the term of twelve months, to go to Cedar Bluff, and help to erect a house, and also to keep a grocery. The plaintiff bound himself to attend diligently to the business, and to take good care of all things committed to his care by the defendant; to make the best sales of the same, in such way and manner as the defendant should direct, and make true return of all the proceeds to the defendant, when he should call for the same.

The defendant bound himself to furnish the plaintiff with such materials as would be comfortable for cooking, and provisions uncooked, together with some cooking utensils, and to

pay the plaintiff for his services at the rate of twelve dollars per month. Or the said defendant was to allow the plaintiff a chance to make a trial of selling, after he should commence, and until the defendant should return with another parcel of liquors; and if the plaintiff then thought proper, he might pay over to the defendant, one dollar and fifty cents per gallon for every gallon of whiskey he might then have sold, and retain the overplus, in place of the twelve dollars per month.

The plaintiff then avers that he entered upon the service of the defendant under the said covenant, and remained therein from the day and year last aforesaid, (which however is left entirely blank in the previous part of the declaration) until — (another blank.) It then avers the failure of the defendant to furnish the articles before agreed on; that the plaintiff made his election to receive the twelve dollars per month, and the neglect to pay the twelve dollars per month for one year; and concludes, that so the defendant has broken his covenant to the plaintiff's damage of five hundred dollars.

The defendant demurred, and the Court overruled the demurrer; whereupon he pleaded as follows:

The defendant says *actio non*, because he saith that the said plaintiff did not truly and faithfully serve the defendant according to the form and effect of the said agreement, but wholly neglected so to do; and on the contrary thereof, the said plaintiff, after the making the said articles of agreement, and during the said term therein mentioned, departed and absented himself from the service of the defendant, and during the said time went into the service and employment of others, without the consent and against the will of the defendant, and continued therein, and hath commenced this action against the defendant before the expiration of the said twelve months, on the articles mentioned, the contract being still open and entire, and hath not returned to the service of the defendant; of all which, he puts himself upon the country.

To this the plaintiff demurred, and the Court having overruled the demurrer, he then replied that the said plaintiff remained in the employment of said defendant until and so long as the said defendant would permit him, and of this he put himself upon the country.

In the record are found two other pleas, which are to this effect:

Actio non, because he saith that from the plaintiff's own showing, he has not continued in the employ of the defendant for the term of twelve months, or for any other specific period, so as to entitle himself to call on the defendant to answer.

Actio non, because he saith that the said plaintiff by his own shewing of the instrument declared, shows that it contains conditions precedent, which were to be performed by plaintiff, which have not been performed by him.

The defendant demurred to the pleas, but no notice is taken of his demurrer by the Court, and he afterwards replied to the first of the two last stated, that he had performed the conditions precedent so far as the defendant would permit him.

The case was tried as on an issue, and a verdict found for the defendant, on which judgment was rendered.

It is stated in the judgment entry, that a re-pleader was awarded, but this is presumed to refer to other pleadings not shewn by the record.

To reverse this judgment, the plaintiff prosecutes his writ of error, and assigns that the Court erred in awarding a re-pleader, and in overruling the demurrers to the first, second and third pleas.

GOLDTHWAITE, J.—The declaration in this case, although it assigns a breach of the covenant, in not furnishing the cooking utensils, &c. as provided for, shews also that this did not prevent the plaintiff from entering upon the service of the defendant, and the cause of action is substantially for the twelve dollars per month, although damages might likewise be recovered for the failure to provide provisions, &c. But it is equally certain that the plaintiff had no right, under the contract, and whilst it was subsisting, to leave the service of the defendant until the expiration of twelve months; and if he did so, his right to compensation, was entirely gone, both as to the wages for his services, and the amount which he might have expended for provisions, &c.

In this view of the contract, the plea is a complete answer to the declaration, and its only defect is, that it concludes to the country instead of with a verification.

We consider the conclusion of a plea as mere matter of form, which cannot be reached by demurrer. This being its only defect, the demurrer to it was correctly overruled.

With respect to the other pleas, no action seems to have been had by the Court upon them, and therefore we cannot intend they were demurred to, or that the Court sustained them. As to the re-pleader, we can arrive at no conclusion, that it was wrong, because it does not appear that any action was had upon it, or that in point of fact any new pleadings were had.

Our conclusion is, that no error is shewn in the record, and the judgment is affirmed.

MAGEE V. BILLINGSLEY.

1. It is a general rule of the common law, that by the mere contract of sale, the property in the thing sold passes to the vendee, yet he is not invested with a right to the possession, if no credit was agreed upon, until the price is paid, or tendered.
2. Where the sale is perfect, the goods are placed at the buyers risk, even before delivery, and if they perish without the sellers fault, the purchaser is bound to pay the agreed price.
3. Goods are not transferred to the vendee by the contract of sale, if any material acts remain to be done before delivery, to distinguish them, or ascertain their price; or where a sale is made subject to the condition of weighing, counting, or measuring, the property does not vest in the buyer until the goods are weighed, counted, or measured.
4. Upon a sale of goods by sample, there is an implied warranty by the seller, that the bulk of the commodity is equal in quality to the sample exhibited to the buyer; and if it does not correspond, the purchaser may refuse to receive it, or if received he may return it in a reasonable time, allowed for examination, and thus rescind the contract.—But if he keep the goods and use them as his own after time allowed for inspection, he cannot repudiate the purchase, though he may maintain an action for a breach of the implied warranty.
5. Where goods are sold by sample, the property passes immediately to the vendee, if the performance of no act is stipulated by either party as a condition precedent, and the loss resulting from their destruction must be borne by him, if they were of the quality indicated by the sample; if they were not of that quality their destruction cannot deprive him of the right of repudiating the contract, where a reasonable time had not elapsed for examination, nor can it revive that right, if such time had passed previous to their loss.

6. Where a contract is made for the sale of cotton stored in a warehouse, and an order given to the purchaser, addressed to the warehouseman, directing the latter to deliver to him the cotton, the *prima facie* inference is, that the seller intended to part with the property and possession to the buyer.
7. A warehouseman is an agent of the party storing goods with him merely for the purpose of taking care of them, and a notice to him by one who has made a contract for them, that he will not receive them, is no notice to the seller.
8. Evidence which does not tend to establish any material fact, is inadmissible.
9. Where the seller of goods makes a false representation as to their quality and condition, the buyer, upon ascertaining it, may rescind his contract.
10. An agreement was entered into to purchase an entire crop of cotton, without reference to quantity, (then in a warehouse where the contract was made,) at an agreed sum per pound, all of which had been weighed by a public weigher within seven days preceding; the price was to be paid when called for, within a few days, and an order on the warehouseman was given to the purchaser: *Held*, that weighing was not annexed by the parties as a term of the contract necessary to complete the sale, and the law would not imply it in the absence of proof showing it was contemplated; inasmuch as it was not necessary to ascertain the aggregate sum to be paid.
11. A charge upon an abstract point of law, not calculated to mislead the jury, furnishes no ground for the reversal of a judgment.
12. An error in a single expression contained in a charge to the jury, if *explained and corrected*, so that the jury could not have been misled by it, will not be fatal to the judgment.

Writ of error to the County Court of Mobile.

THIS was an action of *assumpsit*, in the County Court of Mobile, by the defendant in error, against the plaintiff. The causes of action alleged in the declaration are, work and labor done, goods, wares and merchandize sold and delivered, money had and received, and an account stated. The cause was tried on the general issue. On the trial the defendant excepted to the ruling of the Court, and now assigns the same for error. From the bill of exceptions it appears, that evidence was adduced, showing that on the morning of the 23d April, 1840, William Hutchinson, a cotton broker in the city of Mobile, entered into a contract with A. Pope & Son, the factors of the plaintiff, in that city, for the purchase of the plaintiff's crop, which had been previously stored in an open shed, adjacent to Hitchcock's Press, and under the control of its lessees. The precise number of the bales were not known, but it was understood, there were above seven hundred. The price agreed on was seven and three-eighth cents, to be paid in cash, that is, when called for, within three or four days. There was some conversation between the broker and Pope & Son, as to the

condition of the cotton—the former testifying that the latter said it was in good order, and the latter that they said it was in good order, or they would put it in good order. It was also stated at the time of the contract, that some of the cotton had been picked. Hutchinson testified, that on the morning of the 24th of April, 1840, he stated to Pope, that he should require the cotton to be re-weighed, but of this Pope stated he had no recollection. Hutchinson also made the same requirement of the weigher of Pope & Son, who replied that the cotton had been weighed within a short time previously, and that it was useless to re-weigh it; to this remark of the weigher, Hutchinson did not rejoin.

It was in evidence, that on the 17th April, 1840, some of the cotton had been weighed by the weigher of Pope & Son, at their request, and that some had been weighed since that day. A full table of weights was exhibited by the weigher at the trial, but there was no proof that it was shown to Hutchinson, or that there was any further conversation between the parties than is detailed above.

Hutchinson stated it was his custom to require all cotton purchased by him to be weighed after his contract, by the weigher of the seller. It was also shown, that about 10 o'clock on the morning of the 24th of April, a delivery order was given to the clerk of Hutchinson, as follows:

“Hitchcock’s Press will deliver to William Hutchinson, all the cotton sent in store by us, marked T. B., more or less, also twenty-six bales marked J. A. C., and three H. P.

A. POPE & SON.
per M. B. Cook.”

April 23, 1840.

Pope & Son caused an entry to be made in their books of the transaction, and upon the delivery of the order at the Press, the following entry was made in the books of the proprietors:

“April 23,	A. Pope & Son, William Hutchinson.	T. B., more or less. J. A. C., 26. H. P. 3.”
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The delivery order was presented at the Press about 10 o'clock, A. M. of 24th April, 1840, when the Press-men turned down about four hundred bales for examination and ship-marking; and about 4 o'clock, the clerks of Hutchinson began to examine the cotton—Hutchinson not having seen it, the

contract being made merely upon an exhibition of samples. After examining about one hundred and twenty bales, and placing the shipping marks of the defendant upon them, the clerks of Hutchinson found some cotton greatly out of order. They went through the cotton which had been turned down to them, and found, according to their testimony, the whole in indifferent order, and some unmerchantable and unfit for compression; about two hundred and fifty bales were in this latter condition. The Press-men testified, that from one hundred and fifty to seventy-five bales were out of order. Pope testified that the cotton had been re-picked, which fact was notorious, and he supposed the defendant must have known it. With a view to show an abandonment of the contract by Magee, his counsel proposed to prove that he came in while the clerks were examining the cotton, and directed them to mark no more; and, further, they offered to read a letter to Hutchinson, dated 24th April, 1840, by which Magee informed him he would have nothing more to do with the plaintiff's cotton; this evidence was objected to by the plaintiff's counsel; their objection sustained, and thereupon the defendant excepted. It was further in evidence, that neither Hutchinson, Magee, or their agents had any thing more to do with the cotton, and that on the same evening it was consumed by fire; about three-fourths of a day was necessary to re-examine such a parcel of cotton, and the same length of time to weigh it.

The ware-house keeper stated, that when an order was brought to him, he took down a copy of it for fear of its loss; that when the name of the principal is disclosed, an entry is made on another page of his book, setting out the name and shipping marks. He stated that the cotton could not be examined without such an order as the broker produced; it was frequently the case, that on examination the broker rejected the purchase: if a small parcel was rejected, it commonly made no difference, but when a large parcel was rejected, he could not give a receipt without the consent of the factors. He also stated that the only effect of the delivery order was to permit the broker to have the cotton examined and weighed; but the property was not changed until a second entry was made as above stated.

The plaintiff then called the broker to prove his agency,

who stated on his cross-examination, that he always examined cotton after his contract, and took fresh samples; and that the delivery order was to enable him to have the cotton examined and weighed; and if the cotton was found materially to vary from the samples, in any considerable parcel, it was rejected; because the average would not be that upon which the price was calculated. It also appeared that no insurance could be effected upon cotton, in the shed in which the cotton in question was stored. On these facts, the Court charged the jury as follows:

1. If the cotton was sold by samples, and it did not correspond with the samples by which it was sold, the purchaser had a right to refuse to receive it.

2. If the cotton was represented by the seller to be in a good condition when sold, and on examination found to be in bad order, the purchaser had the right to reject it.

3. If the cotton was such as represented when sold, both as to quality and condition, then the agreement to purchase, and receiving the order on the ware-house keeper, was a sufficient delivery and sale; and the purchaser was bound to take it, although it may be destroyed by fire before its actual delivery. If, between the sale and the actual delivery of the cotton, it should advance in price, the purchaser holding the order on the ware-house, would be entitled to receive the cotton, and the planter or commission merchant, could not rescind the contract. These, I lay down as general rules. But it is contended on the part of the plaintiff, that the cotton was such as represented when sold, and that, therefore, it was after the delivery of the order to the purchaser at his risk. This is matter for your ascertainment, from the evidence before you.

Again: the plaintiff's counsel contends, that if the defendant had a right to rescind the contract, he was bound to notify the plaintiff, or his agent, of his determination to do so at the earliest practicable time. In this, I entirely agree, and it is for you to say, whether between the time of the delivery of the order to the defendant, and the discovery that the cotton was not such as represented by the samples and assurances, he had a reasonable time, before the cotton was destroyed, to give notice of his determination to the plaintiff. I do not mean to be understood here, that the quality and condition of the cotton

was in fact, misrepresented by the plaintiff. This is one of the questions for you to settle. The defendant contends that he is not liable; because, he says, the cotton was not such as represented to him when purchasing, and he had, therefore, a right to repudiate the contract, and that he did all that could in reason be required of him to notify the plaintiff. These are facts for your ascertainment. The defendant would make you and the Court believe, that his having repudiated the contract in the presence of the keeper of the ware-house, was sufficient notice to the plaintiff. In this I cannot agree. Pope was the agent of the plaintiff; Hutchinson, the agent of the defendant. The ware-house keeper only received the cotton on storage, to be delivered to the plaintiff, or his agent, and having nothing to do with the sale of the cotton, could not be considered as the agent for either.

The defendant, however, contends further, that as the cotton was to be re-weighed, there could be no consummation of the contract, until that re-weighing took place. If such be the fact, and the right to re-weigh had not been waived by the plaintiff, it is for you to inquire who was to have the re-weighing done—if by the plaintiff, the contract was not complete until it was done—if by the defendant, did he have time, after receiving the order to re-weigh the cotton before it was burnt. To all of which the defendant excepted.

J. A. CAMPBELL, for the plaintiff in error:—The contract between Pope & Son and Hutchinson, on the 23d April, did not operate a change of the property in the cotton. The aggregate amount of the price was not ascertained, but a further act was necessary. 6 Cow. Rep. 254; Poth. on sales, 190; Troplong Com. De La Vente, 86, 88; Motifs. Rapports et opinions, &c. 617–8. The delivery order was not an act by which the parties ascertained the price, this could only be done by weighing, unless that was dispensed with.

The contract being indefinite and indeterminate, it was necessary for the plaintiff to show something, on the part of Hutchinson, evincive of a determination to accept of the cotton without previously ascertaining the price, and to show his own intention to confer a right of property. The intention of the parties should harmonize on the point. Chitty on Con. 115;

3 Johns. Rep. 420; 9 Eng. C. L. Rep. 163; Troplong Com. De La Vente, 86-8.

The delivery order did not have the effect *per se*, to transfer the right of property in the cotton, and unaided, it cannot be intended that it was so received. An actual delivery would not have the effect to pass the property, if made under circumstances to authorise the supposition that it was intended to enable the performance of an act, which was necessary to the consummation of the contract. 7 Wend. Rep. 404; 14 ib. 32; Dana's Rep. 58; 6 Pick. Rep. 280; 6 East's Rep. 614; 13 Pick. Rep. 175; 36 Eng. C. L. Rep. 323; 10 ib. 138; 2 M. & S. Rep. 397; 7 G. & Johns. Rep. 406.

The purchaser of cotton by sample, has the right to examine the bulk, and verify the sample, before it can be considered as at his risk, if he insists on it; and a refusal to permit the exercise of the right, is of itself an excuse for the abandonment of the contract. Chitty on Con. 138; 7 Cow. Rep. 86; 8 Serg't & Lowb. Rep. 1; 1 B. & A. Rep. 387. The right to reject the purchase necessarily follows the right to examine; but this right must be exercised under a responsibility for improperly refusing to proceed with the contract. The contract was binding from the beginning; but if the right of examination is insisted on, before it became settled and determinate, the subject of the sale did not pass to the purchaser, and the seller, if aggrieved, would be left to his remedy against him for the wrongful refusal to proceed with the contract. 1 Camp. Rep. 113; 4 Esp. Rep. 95; 3 B. & P. Rep. 233; 7 Johns. Rep. 86; 6 Serg. & Lowb. Rep. 456; Poth. on Sales, Art. 311; Chitty on Con. 138; Ross on Vend. 176; Thornton v. Winn, 12 Wheat. Rep.

The evidence shows it was the intention of Hutchinson to exercise the right of examination, before the contract was definitely closed; the reasonable inference is, that the delivery order was received to enable him to do so. The purpose for which the paper was received, was a question of intention, open to explanation, and in itself it was entirely inconclusive. 7 Dana's Rep. 58; 4 Wash. C. C. Rep. 13 Peters' Rep. 89; 36 Eng. C. L. Rep. 323. But the object of giving or receiving the delivery order, was not considered by the County Court as a question of fact, but rather as a conclusion of law.

The remark of Magee, in the presence of the person having

the custody of the cotton, that he would have nothing more to do with it, was sufficient to show that the right of property had not vested in the purchaser. The evidence shows that the cotton was to have been weighed, and there is nothing to show that this was dispensed with, consequently the risk of the subject of the sale, was the plaintiff's, when it was destroyed.

As to the acts of partial ownership, by marking some of the cotton, &c. these are but *indicia* of the purchasers intention; and the highest acts have been considered as not operating a change of property. 7 Dana's Rep. 58; 1 Taunt. Rep. 319; 4 Esp. Rep. 95; 7 Johns. Rep. 473, 11 Wend. Rep. 138.

Plaintiff's counsel commented on the case in 6 Rand. Rep. 473, and cited Com. on Con. 111; Chitty on Con. 112; 1 Mason's Rep. 437; Woods v. McGehee, 7 Ohio Rep. 127, 2d part.

He further argued, that in order to perfect the sale, it was necessary the cotton should have been individualized, (as the civil law writers express it,) before its destruction; that the "*fais contradictoirement*," as Troplong calls it, was not shown, nor the terms necessary to a consummation waived by the parties. If the price was uncertain, because the weight was unascertained, a mere waiver of that term of the contract, would not complete the sale, unless the price or weight was also agreed. Motis. Rapports et opinions, &c. 618.

The default on the part of the purchaser, will not consummate the sale, though it may subject him to damages. Where merchandize is not sold "*en bloc*," but by weight, count, or measure, the sale is not perfect, and the things sold remain at the risk of the seller, until they are weighed, counted or measured; but the purchaser may demand their delivery, and in case of a failure, recover damages and interest for the non-execution of the contract. 1 Troplong Com. De La Vente, 86, 88.

HOPKINS & LESESNE, for the defendant:—The property in chattels, at the common law, passed to the purchaser by virtue of the contract of sale, although there was no actual delivery, or writing attesting the contract. Long on Sales, 42, 261, '2, '5; Por. Rep. 88; 27 Eng. C. L. Rep. 92; 2 Kent's Com. 387; Shep. Touchstone, 224; Sory's Conf. of Laws, 318, note 1st, 2d ed. 13 Pick. Rep. 183; 20 *ibid.* 283; 7 East. Rep. 558; 14 Wend. Rep. 31; 4 B. & Ald. Rep. 753. The 17th § of the English statute of frauds, first made a delivery, or something

equivalent, essential to transfer the right. But if a virtual delivery was necessary at the common law, the delivery order to Hutchinson operated as such *proprio vigore*. Lickbarrow v. Mason, 19 Law Lib. 281, 313, and cases cited in the notes; 3 Bos. & P. Rep. 68; 7 Taunt. Rep. 265, 292; 13 Pick. Rep. 173, 183; 7 East. Rep. 258, 556, '8; 14 *ibid.* 308; 11 *ibid.* 210; 1 *ibid.* 192; Long on Sales, 268, 275, '6-2 Serg't & Lowb. Rep. 317, 380; 13 Eng. C. L. Rep. 206; 36 *ibid.* 320-7; Dana. Rep. 64; 1 Bos. & P. Rep. 69; 2 Campb. Rep. 243, '5, 344-5; 1 Pick. Rep. 481; Blackf. Rep. 326; 16 Maine Rep. 17; 17 *ib.* 344; 1 Yeates' Rep. 527; 2 Wash. C. C. Rep. 294; 6 Rand. Rep. 473; 2 Camp. Rep. 243; 9 Cow. Rep. 119; 3 Mason's Rep. 107; 6 Porter's Rep. 138; 9 Eng. C. L. Rep. 170.

The re-weighing of the cotton was not a condition precedent, in order to vest the property in the defendant. The dominion exercised by the defendant's broker and clerks acting for him, very satisfactorily show who was regarded as the owner. But it is immaterial what were the facts in this respect, since the charge of the Court on the point is unobjectionable, very properly refering it to the jury to determine what were the inferences from the evidence. So in respect to the examination of the cotton and the repudiation of the contract, the charge was in effect, what the plaintiff's counsel admit the law to be. And whether the contract operated to transfer the right of property or not, the plaintiff cannot complain of error, in point of law, but should have asked a new trial in the County Court. 13 Maine Rep. 425; 15 *ibid.* 225.

Where the sale is for cash, the seller has the right to the possession until the money is paid, although the right of property passes to the purchaser immediately. But where a credit is given, both the right of possession and property passes to the purchaser, subject to the right of stoppage in *transitu*, should he become insolvent before the goods reach their destination. But these rights of the seller do not, however, prevent the contract from being operative; during the period of detention, the goods remain at the risk of the purchaser. 19 Law Lib. 432, note; 1 Camp. Rep. 109, 113; 10 Eng. C. L. Rep. 477.

The right of property passes by the delivery of the whole, or a part, where in the latter case, there was no intention to withhold the part not delivered. 1 Pick. Rep. 476; 2 H. Bla:

Rep. 504. The case cited from 10 Eng. C. L. Rep. 138, by the plaintiff's counsel, proceeded upon the ground, that the order to the ware-house keeper had never been presented or accepted, and he had not become the agent of the purchaser, so as to transfer to him the actual possession; consequently, the case was within the statute of frauds. In some of the other cases cited, the mere giving a delivery order to the purchaser, was held to transfer the right of possession, where it appeared that there had been a valid contract of sale by a *memorandum* in writing, or the payment of the whole or part of the purchase money. In the case cited by the plaintiff, from 3 Bos. & P. Rep. 233, the contract was void by the English statute of frauds, the acceptance of possession not being such as it required, viz: an actual possession, with the intention to retain it.

If the seller deliver possession to the buyer, the right is transferred, though it may be necessary to weigh or measure the goods, in order to ascertain the price. 13 Pick. Rep. 183; 20 *ibid.* 280. The contract was complete on the 23d April, and there was no stipulation for re-weighing, such a thing was not contemplated, and was unnecessary, as the cotton had just been weighed. The contract in this respect was not modified the next day, and it may be questioned whether the plaintiff's factors could assent to such a modification. Long on Sales, 398; 1 Stark. Rep. 233; 1 Bailey's Rep. 648.

Though the Court stated it as a general proposition, that the contract of sale and delivery order, transferred the property in the cotton to the defendant, yet the subsequent part of the charge referred it to the jury to determine every question raised by the evidence, viz: by whom it was to be done, if at all, when, and whether it was waived by the defendant, &c. This was correct, as shown by the authorities. 7 Dana's Rep. 58, 63-64. Besides, the examination of four hundred bales and putting the ship mark on them without weighing, shows that re-weighing was waived.

Upon a sale by sample, the right of property passes to the vendee, but he may rescind the contract, if the goods are in a bad condition, or do not correspond with the samples. The rescission, however, must be made in a reasonable time, and until the seller is notified of it, the property is at the vendee's risk. 1 Camp. Rep. 190; 2 *ibid.* 530; 9 Wend. Rep. 574;

Chitty on Con. 366-7. But the purchaser cannot rescind, as a matter of course; the bad quality or condition of the goods, must be shown, if the vendor refuses to accept them and sues for the price.

A contract cannot be rescinded, unless the parties can be placed *in statu quo*. Chitty on Con. 275. And the remark of Mr. Magee, in the presence of the ware-house-keeper, does not amount to a rescission; because, even admitting the ware-house man to have been the agent of the plaintiff to accept a rescission, there was no offer to return the delivery order. There was no evidence that the ware-house-man knew Magee as the purchaser authorised to rescind—and the letter of Magee, is a mere instruction to his broker to rescind, but does not amount in itself to a rescission, and was consequently properly excluded from the jury. 2 Eng. C. L. Rep. 317-380.

The charge of the Court upon Magee's letter, was upon evidence not before the Court, and abstract; but in itself it is unobjectionable. The same remark may be made in respect to the right of the purchaser to rescind the contract.

The case cited from 8 Eng. C. L. Rep. 1, does not, as supposed, sustain the doctrine that the property does not vest in the seller until after the goods have been examined by the buyer, though nothing remains to be done by the vendor. In that case, the contract was rescinded, because the seller had not all the goods he had agreed to sell, when the purchaser called to inspect them. Chitty on Con. 134, note; 12 Law Lib. 189.

It was not admissible to show by proof the legal effect of the delivery order—the paper explained its own meaning, independent of mercantile usage. The order, especially after its recognition by the ware-house-man, operated to transfer the property, in the same manner that the delivery of the key of a ware-house, in which property sold, was stored.

To show what acts remaining to be done will prevent the property from vesting in the vendee, the defendants cited the following additional authorities: 17 Eng. C. L. Rep. 373; 1 *ibid.* 211; 12 Wheat. Rep. 193; 6 East's Rep. 614; 13 *ibid.* 522; 4 Camp. Rep. 237; 6 Cow. Rep. 250; Poth. on Sales, 187.

COLLIER, C. J.—It is a general rule of the common law, relative to sales of personal property, that by the mere con-

tract of sale, the property in the thing sold, passes to the purchaser, yet he has no right of possession, if the goods be not paid for and no credit were agreed upon. Therefore, he cannot take them, or sue for their non-delivery, until the price be paid, or tendered by him. 19 Law Lib. 431, note to Lickbarrow v. Mason; Chitty on Con. 4 Am. ed. 297, 350. Long on Sales 42, 2 Am. ed. Noy's Maxims, 88; Sheppard's Touchs. 225; Potter v. Coward, Meig's Rep. 22. And such in effect, is the rule of the civil law. Pothier says, "that as soon as the contract of sale is perfected, the thing sold is at the risk of the buyer, though it is not delivered to him; so that, if during this period it happens to perish, without the seller's fault, the seller is discharged from his obligation, while the buyer does not thereby become discharged from his, but still remains bound to pay the agreed price." Treat. on Con. 187, § 308; 1 White's Recopilacion, 185-6.

The common law of England, has, however, been modified by the seventeenth section of the statute of frauds, which enacts that "no contract for the sale of any goods, wares and merchandizes, for the price of 10 pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note, or *memorandum* in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorised." Long on Sales, 2 Am. ed. 44. The English decisions that have been made, since the enactment of this statute, touching the constituents of the contract of sale, have been generally influenced by it; hence, it is laid down, that where goods are sold, in order to complete the contract, the buyer must accept and actually receive the same, or a part thereof; give something in earnest, or part payment, or else the parties, their agents, &c. must make and sign some note, or memorandum in writing, of their bargain. Such is not the law in this State. We have no statutory provision similar to the section quoted; and, consequently, the common law remains unchanged.

It is not every contract for the sale of personal property, though binding in itself, that will so operate as to transfer the thing to the vendee *eo instanti*; the property remains in the ven-

dor; and the goods are at his risk, if any material acts remain to be done, before the delivery, to distinguish them, or ascertain the price thereof. Thus, where a portion of goods in a bulk are sold, no property passes to the vendee, if such part cannot be distinguished without weighing, measuring, &c. until it has been separated from the entire quantity. Chitty on Con. 299; Long on Sales, 267-8; Montif's Rapports et Opinions, &c. 617, 18; Pothier on Sale, 309.

In Zagury v. Furnell and another, 2 Camp. Rep. 240, the plaintiff sold to the defendants a certain number of bales of goat skins, at a stipulated price, supposed to contain five dozen each. It was shown to be the duty of the seller to count the skins, that it might be seen whether each bale contained the number specified in the contract; but before any of them were counted, they were destroyed by fire. The question was, at whose risk were the skins at the time of their destruction.— Lord Ellenborough was of opinion, that the enumeration of the skins was an act for the benefit of the seller, in order to ascertain the price; and as this remained to be done when the fire occurred, there was not a complete transfer of the property, and the skins continued at the seller's risk. So in Hanson and another v. Meyers, 6 East's Rep. 614, it appeared, that the vendee had agreed to purchase all the vendor's starch in a certain ware-house, at a stipulated price and term of credit, the exact weight was not known, but was to be afterwards ascertained, and fourteen days were allowed for the delivery. The vendor gave a note to the vendee addressed to the ware-house-man, requesting him *to weigh and deliver* to the vendee all his starch. The court of King's Bench held, that the contract contemplated that weighing should precede delivery, and that although a part had been weighed and delivered, yet the vendor might, upon the bankruptcy of the vendee, retain the remainder, which remained in the ware-house in his name, unweighed. And in Wallace v. Breeds, 13 East's Rep. 522, which was a contract for the sale of oil, it appeared to be the custom, before the delivery, for the seller's cooper to search the casks, and for a broker on behalf of both parties, to ascertain the foot dirt and water in each, (for which allowance was to be made,) and then the casks were to be filled up by the seller's cooper at their expense; it was held, that till these acts were done and delivery

made, the contract was not complete to pass the property, and the vendor might countermand the sale, upon the insolvency or subsequent bankruptcy of the purchaser. So, where a sale was made of ten out of twenty tons of flax, all being in mats of an unequal size and quantity, or of a stipulated number of tons of oil, which was part of a larger quantity in a cistern; a similar conclusion was attained.—*Busk v. Davis*, 2 M. & S. Rep. 397; *Shepley v. Davis*, 5 Taunt. Rep. 616; *Austen v. Craven*, 4 Taunt. Rep. 644; *White v. Wilkes*, 5 Taunt. Rep. 176. But it is needless to add to these citations, a further notice of English decisions on the point, since they all recognize the principle we have stated, although some of them may have mistaken its application to the facts of the particular case.

We will, however, notice some few of the adjudications made in the United States, and these too will be found, in general, to proceed upon the principle, that the thing sold is not put at the buyer's risk, where it is not in a deliverable state, as being to be counted, weighed, measured, or separated from something else, of which it forms a part. Thus, in *Crawford v. Smith, et al.* 7 Dana. Rep. 59, the plaintiff sold his stock of goods to the defendants, for which they were to pay by promissory notes, payable at stipulated periods. The parties, the day after the sale, began to invoice the goods, a few articles of which were sold during the same day as the goods of the defendants, with the plaintiff's assent. During the night of that day, and before all the goods were invoiced, a thief broke into the house and stole sundry articles, some of which were, and others were not, invoiced. The question was, on whom should the loss of the goods stolen, fall. The court held, that such of the goods as were not measured and invoiced, remained the property of the seller, who could not recover the value from the buyer; but those that were measured, invoiced and laid aside, had become the property of the purchaser. The principle was expressly recognized, that while any thing remains to be done by the seller, to ascertain the quantity or price, and there is no stipulation for passing the title before that is done, the title does not vest in the purchaser; the right of property, as well as possession, will remain with the seller, and the loss will be his if the property perish while the ownership is in that condition. But as soon as the quantity and price are ascer-

tained, and the goods are ready for delivery, upon the terms of sale being complied with, the title vests in the purchaser, and they are at his risk. The sale may be of many articles, the quantity and prices of which are to be ascertained; in such case, the title to each distinct article vests in the purchaser as soon as its quantity, or number, and value, are ascertained.

And further, it was decided that the intention of the parties as to the weighing, counting, or measuring goods sold, was a matter of fact, to be inferred by the jury alone, from the nature of the case, and all the accompanying circumstances. And it has been decided in New-York, that where there is any thing to be done by the parties, preparatory to ascertaining the price of goods sold, when the sale is for cash, a delivery of the article does not divest the title of the vendor until the price be ascertained and paid.—*Ward v. Shaw*, 7 Wend. Rep. 404; *Andrew v. Dieterich*, 14 Wend. Rep. 31.

The law has, however, been otherwise adjudged in Massachusetts; there, the general principle is admitted, that where any operation of weight, measurement, or counting, remains to be performed, in order to ascertain the price, the quantity, or particular commodity to be delivered, and to be put into a deliverable state, the contract is incomplete until such operation is performed. But where the goods or commodities, are actually delivered, that shows the intent of the parties to complete the sale by the delivery; and the weighing, measuring, or counting afterwards, would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. "The sale," say the Court, "would be as complete as a sale upon credit, before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position."—*Macomber, et al. v. Parker*, 13 Pick. Rep. 175; *Riddle v. Varnum*, 20 Pick. Rep. 280.

In *Pleasants v. Pendleton*, 6 Rand. Rep. 473, it appeared that one merchant sold to another 119 barrels of fine flour, stored in a ware-house, the price was agreed, and the vendor gave to the vendee a bill of parcels, specifying the number of barrels of each particular brand, an order on the ware-houseman and a receipt in full; and in return received from him a check on the bank for the price of the entire quantity. At the

time of the sale, the vendor had 123 barrels of flour in the ware-house—the 4 barrels not sold, being of the same brands as some of those embraced by the bill of parcels and delivery order to the ware-house-man. It was held, that the property in the 119 barrels, passed to the vendee, notwithstanding the want of separation; and that the vendor was entitled to recover the price of the vendee, though the warehouse, with its contents, was destroyed by fire, the next morning after the sale, before the actual delivery of the flour, and before, with ordinary diligence, it could have been received. In Ohio, dissatisfaction with the case last cited, has been expressed in strong terms; there the Court say, “it is impossible to hide from one’s-self, that the fact of the small difference between 123 barrels, the whole quantity, and 119 barrels, the number sold, may have gone a great way to influence the judgment. It was a hard case, and hard cases always make shipwreck of principles. It is impossible to answer the difficult question, if part only of the flour had been burnt, in that case on whom would the loss have fallen.”—*Woods v. McGee*, 7 Ohio Rep. 127. The case decided in Ohio, merely declares the principle which we have already stated, viz: “that where a part of an undivided mass of property is sold, it is necessary that some further act should be done, specifying and identifying the part sold,” in order to vest the property in the vendee. In respect to *Pleasants v. Pendleton*, it may be remarked, that if defensible at all, it pushes principle to its utmost tension. The case before us does not require us to give to the authorities, upon this branch of it, a more critical and extended notice.—See *Pothier on Sales*, 190-1-2.

Troplong, a distinguished civilian and commentator, in accordance with the common law authorities, says, that where merchandize is sold in bulk, or *per aversionem*, if the money is paid or a delay of payment stipulated, the property immediately vests in the purchaser. But if the sale is made subject to the condition of weighing, counting, or measuring, the same is not perfect, and the things sold are not put at the risk of the purchaser, until they are weighed, counted, or measured; and though the refusal to proceed in the performance of the condition of the contract, may put the party refusing in default, and subject him to the recovery of damages, yet the sale is not

thereby completed.—See 1 vol. Com. on 6 tit. 3 Liv. Civil Code, 86–88. In order to make a waiver of a term of the contract available, it must have been assented to by both parties.

To sum up the law, it may be laid down, that where the sale is made for cash, or on a stipulated credit, that it is not the delivery, or tender of the thing sold, or the payment or tender of the money, which invests the purchaser with the right of property, or which gives to the seller a right to recover the money. The sale is complete as soon as both parties have agreed to the terms, that is, as soon as the one says I will take a certain price and the other undertakes to pay it; and their rights are then fixed. The property in the thing passes to the vendee, and is at his risk, and he may demand the possession upon the payment or tender of the purchase money. This is to be understood, as we have seen, where the contract does not contemplate some further act in order to place the property in a deliverable state; as to ascertain its price, &c. Where this is the case, although the contract is valid, it is not regarded as executed, until after the act has been done. But it is always a question of fact, to be determined by the jury, under the direction of the Court, whether the sale was consummated by the contract, or whether and by whom any thing remained to be done, in order to perfect it.

It is insisted, that the property in the cotton in question, did not pass to the purchaser until he had examined the bulk and found it to correspond with the samples furnished him. In respect to sales by sample, there is an undoubted right to refuse to receive the goods, or if received, to return them in a reasonable time, allowed for examination, if they do not correspond with the sample. But if the vendee, after time for inspection, treat the goods as his own, by exercising an act of ownership over them, he will be considered to have accepted them, and cannot afterwards repudiate the contract, so as to resist an action for the price; although he may still maintain an action for the breach of the implied warranty, that the bulk is agreeable to the sample.—Chitty on Con. 4 Am. ed. 366–7. And it has been held, that on a sale by sample, the buyer has a right to inspect the entire parcel at any proper and convenient time; and if the seller refuse to show it, the buyer may immediately rescind the contract,—Lorymer v. Smith, 1 B. & C. Rep. 1;

or, 2 D. & R. Rep. 23. The result of the authorities is, that on a sale by sample, the vendor stipulates that the bulk of the commodity shall be equal to the sample, in quality.—Williams v. Spofford, 8 Pick. Rep. 259; Hastings v. Lovering, 2 *ibid.* 219; Sands v. Taylor, 5 Johns. Rep. 359; The Oneida Man. Co. v. Lawrence, 4 Cow. Rep. 440; Andrews v. Kneeland, 6 Cow. Rep. 354; Bradford v. Manly, 13 Mass. Rep. 139; Gallagher v. Waring, 9 Wend. Rep. 20; Beebe v. Roberts, 12 *ibid.* 413; Boorman v. Johnson, 12 *ibid.* 566; see cases cited in Ricks, adm'r. v. Dillahunt, 8 Porter's Rep. 133. And this stipulation is regarded in law as an implied warranty, not that the article is merchantable, but that the bulk corresponds with the sample, or is of the same quality.—Dane's Ab. Ch. 62, art. 2, sec. 17; Chitty on Con. 356, 4 Am. ed.; Long on Sales, 191; Ross on Vendors, 340, *et post.*

A sale by sample has been assimilated in argument, to a sale of wine, &c. upon the condition of being tasted; and Pothier on Sales, has been cited to show that, "in sales made subject to the condition of tasting, the buyer may refuse to execute the bargain, if he does not find the goods to his taste." And, "consequently, things sold do not become at the risk of the buyer, until he is put in delay to taste them."—See page 193-4. The learned author remarks further, in regard to such sales, "It is to be observed, also, that we must distinguish whether the buyer stipulates, that he shall taste the goods, in order to know whether they are to his taste or not, or only to know whether they are good, lawful, merchantable, or undamaged. It is in the first case only, that he is at liberty to refuse the bargain, by declaring, after tasting the goods, that they are not to his taste; in the other, he cannot refuse the goods, provided they are found to be good."—Page 194. Thus we see, that the condition in the sale, which gives the permission to taste, results from the nature and terms of the contract; and the consequences resulting from it depend upon the purpose for which it was stipulated. If with the intention of ascertaining whether the goods are agreeable to his taste, as the buyer is the sole and final judge, the reason of the thing forbids that the property should vest in him, until he had decided whether the quality of the goods pleased him, and that he would receive them.—But if the stipulation was made, merely that the purchaser

might learn whether the goods were merchantable or undamaged, he cannot refuse to receive them, if they are found to be good; his contract is obligatory upon him, and he cannot repudiate it. The contract stated by Pothier, bears but a very remote similitude to a sale by sample; it is in principle the common case of a sale where some act remains to be done by the buyer in order to its consummation. Until such act be done, or waived, as we have seen, the right of property is not changed.

Warranties are either express or implied—in the first, the seller covenants, or undertakes in terms, that the goods are of a certain quality, &c. The latter description of warranty, is one not expressly made, but the law implies it from the fact and manner of the sale, as well as the character of the thing sold. “Thus, the seller of provisions tacitly agrees that they are wholesome at the time of delivery. So, the merchant abroad, who fills an order for his customer residing in this country, impliedly stipulates with the purchaser, that the goods are merchantable; and one who sells by sample, undertakes that the article furnished is of the quality of the sample shown.” Ricks, adm’r. v. Dillahunty, 8 Porter, 139, and cases there cited. Now, if it be true, as we have seen, that where there is an express warranty, the bargain itself, by which the vendor agrees to sell and the buyer to purchase, passes *eo instanti*, the property in goods to the latter, unless some act remains to be done to put them in a deliverable state, why is it that the same result shall not follow, where there is only an implied warranty? Suppose an unconditional sale be made of provisions, will not the property vest immediately in the purchaser, or if the distant merchant send goods to the order of his correspondent here, are they not the property of the latter, and put at his risk from the moment they are addressed to him, or his order, and entrusted to the usual mode of conveyance? If the law were otherwise, consequences most ruinous, especially to purchasers, might follow. Goods forwarded from a distance might be seized on their *transit*, and subjected to the seller’s debts, and this, although the buyer had paid for them. So, the purchaser of goods by sample, who advances his money previous to their inspection, would be liable to a similar misfortune, if he acquired no property in them.

The rule upon this point, then, which seems to us most consistent with principle, and in harmony with the general analogies of the law, is to consider the purchaser entitled to the goods and the seller entitled to the money, from the time the bargain is struck, giving to the former the right to refuse to receive them, or to reject them, if upon an examination made in a reasonable time after the sale, or receipt, they shall not agree with the sample. The property thus passing to the buyer, where no act is stipulated as a condition precedent to be performed by either party, the goods are immediately placed at his risk, and the loss resulting from their destruction must be borne by him, if they were of the quality indicated by the sample. If they were not of that quality, their destruction cannot deprive him of the right of repudiating the contract, where a reasonable time had not elapsed for examination; nor can it revive that right, if such time had passed previous to their loss.

With respect to the order to the ware-house-man, to deliver to Hutchinson all the cotton of the plaintiffs in store, it is not *conclusive* evidence to show a transfer of right; but the *prima facie* inference, from an inspection of the paper, taken in connection with the contract, is, that the seller intended to part with the possession as well as the property, in favor of the purchaser. Whether the presentation or acceptance of such an order to the keeper of the ware-house, was essential to invest the buyer with the dominion over the property, and to perfect the transfer of the vendor's right to the cotton, is a question which will not admit of serious controversy. In England, and some of the States of the Union, under the influence of the 17th section of the statute of frauds, or a similar enactment, it has been held, that to invest the vendee with a title to the goods, the order must be presented to the ware-house-man and accepted by him. But in this country, we have no such legislative provision, and by the common law, it is not necessary to a transference of right, that the keeper of goods should agree to become the vendee's bailee. The acts of the agents of the defendant, very strongly indicate that it was supposed the delivery order authorized the defendant to exercise the entire control over the cotton, or they never would have marked it for him. In *Stoveld v. Hughes*, 14 East's Rep. 308, it was held, that where the mark of goods lying in a ware-house is changed

by the direction of the seller and purchaser, it operates as an actual delivery.

The direction of the defendant, in the presence of the warehouse-man, to his clerks, to mark no more cotton, cannot amount to a notice to the plaintiff, that he would abandon the contract. The keeper of the warehouse was the agent of the plaintiff, for the purpose only of taking care of the cotton and delivering it to him, or his order, and a notice to the warehouse-man that a purchaser had refused to receive it, is not a notice in law, to the plaintiff. The letter of the defendant to his broker, does not amount to a repudiation of the contract; at most, it is an instruction to the broker to rescind, or an expression of the defendant's determination to do so. To make such evidence available, it should be shown that there was some act indicating a rescission, communicated to the plaintiff or his agent; such ancillary proof not being adduced, the letter was inadmissible, as it did not tend to establish any material fact.

Having examined the questions of law necessary to be considered, it remains but to notice the charges of the Court to the jury. In respect to the first and second charges, they are clearly unexceptionable. The first asserts the conceded principle, that the purchaser of goods by sample, may refuse to receive them, and repudiate the purchase, if upon inspection, the bulk shall be found not to be agreeable to the sample. The second merely affirms, that where the seller makes a false representation as to the quality and condition of goods, the buyer upon ascertaining it, may rescind his contract.

The remainder of the charge deserves a more elaborate examination. If, say the Court, the cotton was such as represented when sold, both as to quality and condition, then the agreement to purchase, and receiving the order on the warehouse, was a sufficient delivery and sale; and the purchaser was bound to take it, although it may have been destroyed by fire before its actual delivery. Again: If the cotton was to be re-weighed, it was for the jury to inquire, by whom was the re-weighing to be done; if by the plaintiff, the contract was not complete until it was done; if by the defendant, did he have time, after receiving the order, to re-weigh the cotton before its destruction. These instructions may be thus condensed: "If the cotton, as to quality and condition, was such as repre-

sented when sold, the contract and order to the warehouseman, was a sale and delivery; but the jury should inquire whether the cotton was to be re-weighed, and by whom; if by the plaintiff, the contract was incomplete until the act was done: if by the defendant, did he have time, after receiving the order, to re-weigh the cotton before it was burnt." Now, although this charge may not be correct in the abstract, yet, as applied to the facts of this case, it does not show an available error. This conclusion will result from a consideration of the nature of the contract, and the situation of the cotton at the time it was entered into.

On the 23d of April, 1840, Hutchinson, a cotton broker of Mobile, entered into a contract with A. Pope & Son, the factors of the defendant in error, for the purchase of the crop of cotton of the latter, then stored in that city. The price was expressly stipulated at seven and three-eighth cents *per pound*; the place where the cotton was stored was known, but the precise number of bags was not, though supposed to be above seven hundred. Pope & Son, on the 17th of April, caused their weigher to weigh a part of the cotton, and the residue was weighed between that day and the day of sale. At the time the contract was made, nothing was said about re-weighing the cotton; but Hutchinson declared in his evidence to the jury, that he stated to Pope, on the morning of the 24th April, that he would require the cotton to be re-weighed; Pope testified, that he had no recollection of any such conversation.—Hutchinson also made the same requirement of the weighers in the employment of the messrs Pope, who stated to him that the cotton had been weighed but a short time previously, to which he made no reply. Hutchinson testified to the jury, that it was his custom to have cotton, purchased by him, weighed by the weigher of the seller.

The contract was perfected on the 23d of April; what passed between the agents of the parties on the succeeding day, cannot modify it, but can only serve to explain the sense in which it was understood by them, and as declaratory of the terms and conditions attached to it. The agreement was to purchase an entire crop of cotton then present, without reference to quantity, at a certain price per pound, all of which had been weighed by a public weigher within seven days prece-

ding. No stipulation is made for a credit ; but the money is to be paid when called for within a few days. The effect of this contract, especially when coupled with the delivery order to the ware-house-man, vested the property in the buyer, and authorized the seller to demand the money. Weighing was not annexed as a term, the performance of which was necessary to consummate the sale; and the law would not imply it, in the absence of proof, showing that it was contemplated by the parties, inasmuch as it was not necessary to fix the aggregate price.

It cannot be said that the interpretation of the contract should have been referred to the jury, and the duties it enjoined upon the parties respectively, ascertained by them ; for assuming the evidence, so far as it went to defeat a recovery, to be true, and making therefrom all reasonable deductions in the defendant's favor, yet there is nothing to authorise the inference that the contract contemplated the cotton should be weighed before the right of property vested in him. The absence of proof on this point, authorised the Court to assume the decision of the law.

That Hutchinson knew the cotton had been weighed previous to his purchase, is indicated by his declaration to Pope and his weigher, that he should require it to be *re-weighed*. But neither that requisition, or his custom, as he expresses it, to have cotton purchased by him re-weighed by the seller's weigher, can have the effect of introducing a condition into the contract, to which the Messrs. Pope had not previously assented.

We do not intend to be understood as deciding, that it was not entirely competent for the purchaser, had he so elected, to have had the cotton re-weighed, and claim a deduction for any deficiency between the true weights at the time of the sale and those previously ascertained ; and if the variance should be found to be very great, or disproportionately to lessen the value of the entire lot in market, we will not say that it would not be allowable to repudiate the purchase. The facts of this case do not require us to consider these questions. The legal proposition which we maintain is this, when a contract is entered into for the sale of an entire crop of cotton, or a certain number of bales (of defined marks) then in store where the contract is made, all of which had been weighed but a few days

previously, it is not indispensable to complete the sale, that the cotton should be re-weighed, unless the parties by express stipulation, make it necessary, or it be shown by proof that such is the usage of trade. There is an entire absence of proof, showing any mercantile usage on this point, and we cannot intend that there is any which could change the legal meaning of the contract. The evidence of the ware-house-man, as to the time when the property vested in the purchaser, and the effect of the delivery order, could have no influence in determining the law. It was merely a declaration of his opinion.

If re-weighing the cotton was a term of the contract, it was certainly one in which each party was alike interested, and, consequently, could not be waived by either without the assent of the other. But the evidence shows that the seller did not regard it as essential, and the fact of the purchaser examining and placing the shipping mark upon a number of the bales, without manifesting an intention to re-weigh them, would seem rather to indicate that it was not a pre-requisite to investing him with the property in the thing. We do not mention this latter circumstance, as furnishing an argument entitled to great weight in itself, but rather confirmatory of others.

Taking, then, the contract to have been such as we think it was, and it will follow that the portion of the charge in respect to the re-weighing, either by the plaintiff or defendant, was uncalled for, and wholly abstract. It could not have prejudiced, but was rather calculated to benefit the plaintiff in error, in referring to the jury an inquiry which the facts did not suggest, and making the liability of the purchaser dependent upon a consideration which the law did not attach to the contract.—The charge interposed difficulties to a recovery, which the contract, correctly interpreted, did not; but the misapprehension of the law could not possibly have injured the party complaining of it, and as it was upon a point foreign to the evidence, he cannot avail himself of it on error.

In referring to the argument of counsel, the Court say, "The plaintiff's counsel contends, that if defendant had a right to rescind the contract, he was bound to notify the plaintiff, or his agent, of his determination to do so, at the earliest practicable time. In this I entirely agree, and it is for you to say, whether between the time of the delivery of the order to the defendant

and the discovery that the cotton was not such as represented by samples and assurances, he had a reasonable time before the cotton was destroyed, to give notice of his determination to the plaintiff." It was argued that the judge, in declaring his acquiescence in the argument of the plaintiff's counsel, required of the defendant greater diligence than the law exacted, in order to rescind the contract. This objection might be well founded, if the judge had said nothing more than to express his concurrence in the argument; but he goes farther, and very explicitly informs the jury, that a *reasonable time* was to be allowed to the defendant to give notice to the plaintiff of the abandonment of the contract, after the defectiveness of the cotton was ascertained.

The entire charge properly refers the questions of fact to the jury, while the Judge, in terms very intelligible, informs them what is the law as applicable to the facts. In itself, it was not calculated to mislead the jury, to the prejudice of the plaintiff in error; if either party thought it too inexplicit, additional or explanatory instructions should have been prayed.—The points here raised upon the assignment of errors, when considered in reference to the evidence, cannot be said to have been erroneously adjudged by the County Court; and it is not our province to inquire, whether the verdict of the jury was such as it should have been upon the facts disclosed in the bill of exceptions. If the jury improperly weighed the evidence, or misapprehended the law as applicable to it, the defendant should have asked a new trial.

This closes the view which we have thought it proper to take of this interesting and important cause; if we have erred, it is not because we have not sufficiently examined it, but from our inability to understand the grave and, to some extent, novel questions it presents. The result is, the judgment of the county Court is affirmed.

GOLDTHWAITE, J.—I do not concur in the opinion just pronounced, and will briefly state the reasons which lead my mind to a different conclusion from the judgment of the Court.

There can be no stronger illustration than is afforded by this case, of the necessity for fixed and certain rules, by which to ascertain the precise period at which the seller parts, and the

buyer becomes invested, with the right of property in a personal chattel. But this necessity does not arise from, nor are these rules chiefly governed by, the peculiar situation of these parties. It most frequently happens that creditors, insurers or subsequent purchasers, are as much interested as the parties themselves.

Such rules, indeed, have long since obtained, and in my opinion, are amply sufficient to guide us correctly in all cases which can possibly occur. One of the rules, coeval with the common law, is, that if one presently agree to buy from another, and pay him a specified price for his goods, and he agrees to take it, the property of the goods is transferred without any delivery, though the purchaser is not entitled to the possession, until he has paid the price to the seller. This is an absolute sale.

Another rule equally clear, admitted by all writers upon the subject of sales, is that there may be *conditional sales*, and that in all such, no *present right of property* passes to the buyer, but it remains in the seller until the sale is divested of the condition. And I apprehend in these conditional sales the *contract* is perfectly binding between the parties, although it may never be executed. The right of property, however, remains with the seller, and notwithstanding his contract, the goods may be seized by his creditor, or may be sold by him to another purchaser who may be invested with the title by this subsequent sale, and the only remedy of the injured party is by an action on the contract.

I also think there is a marked distinction between a conditional sale, and a sale with warranty, whether the warranty be express or implied only. In the first case, the matter is in *contract* until the *acceptance* of the goods by the purchaser, if the condition is for his benefit, or by its *performance*, if the condition is for the benefit of the seller; but in the other, the contract is *executed* and the purchaser has his remedy on the warranty, without any act to be done by either party; or, according to the more modern rule, he may rescind the contract and claim a return of the purchase money; by returning the goods when these do not correspond with the warranty.

With these rules in view, I will proceed to the examination of this case as it is disclosed by the bill of exceptions. It is ev-

idently the ordinary case of a sale by sample, without any present delivery of the bulk.

When goods are sold by sample, and there is a delivery of the bulk, *without examination*, I apprehend nothing can be more clear, than that the property of the goods is *at once* invested in the purchaser, and he is thrown upon his contract on the implied, warranty if the bulk does not correspond with the samples; or he may return the goods, according to some modern cases, and sue for the money paid.

But where there is no present delivery, it seems to be conceded by all the adjudicated cases, that the purchaser always has the right to inspect the bulk, in order to ascertain whether it corresponds with the sample, and to refuse to receive the commodity, if it does not so correspond. It is not my purpose to review any of the many cases in support of this rule; it will be sufficient to refer to one only, because the existence of such a rule is decisive, in my opinion, to show that this case was put to the jury upon a false principle. The case I refer to is *Hibbert v. Shee*, 1 Camp. 113: where it is said the legal mode of dealing is, that if the article agreed on, is not furnished, the purchaser may reject it and keep his money in his pocket. This indeed is too obvious to require sanction from decision; but the consequences which flow from this rule of reason, as well as of law, seem to me, to furnish that which ought to govern this case.

If the purchaser has a right to *reject* goods when they do not correspond with the sample, this shows conclusively, that the property is not vested in him by the purchase, for it seems to involve a contradiction in meaning, to say that one may refuse to accept that which the law has already cast on him.

It is important to bear in mind that we are not now discussing the question how far a purchaser, who capriciously, or without good cause, refuses to pay for goods purchased by sample, but we are endeavoring to ascertain what is the law between these parties, and on which of them it casts this loss. It has already been shown, that the right to examine, is inseparable from a sale by sample *where there is no delivery*, and I cannot imagine a case, in which a loss, such as this, ought to fall on the purchaser until he has accepted the goods. If he delays examination, it always is within the power of the ven-

dor, to fix his liability by an offer of them, as it also is, if he capriciously or without cause, rejects them.

It is not the least conclusive view to my mind, that the purchaser has no sure method to guard himself by insurance, from loss, until he has determined the goods to be his by an examination, or by taking them into his possession. Is it for one moment to be imagined that Magee was bound to insure this cotton from fire before he had made the examination? or was he bound to do so, when upon that examination he had refused to receive it? On the other hand, let it be supposed that Billingley was insured, and this case, instead of being as it is, was a defence by the insurers, on the ground that he had parted with the property. Ought such a defence to prevail? And yet, it seems to me, there would be nothing novel in these propositions if the true rule is ascertained by the judgment of this case.

I have previously said that the necessity for clear and definite rules upon this subject, do not arise merely out of the relation of the parties to the contract, nor are they chiefly governed by that relation, because creditors, insurers and subsequent purchasers most frequently are immediately interested in such rules. This is apparent from the numerous cases in which such persons are found to be parties to the contest; but, under the rule as declared by the Court, I can conceive of no case in which such persons could be heard. A creditor of the seller, certainly ought not to be permitted to seize the article sold when it does not correspond with the sample, for the reason that the purchaser may waive the defect. Yet in such a case, if the article is destroyed, the loss falls on the seller according to the judgment in this case.

Again, the purchaser is covered by an open policy against the risk of fire: is it possible that the insurer ought to be allowed to contest the right to recover when destruction ensues, because the bulk does not correspond with the sample, and therefore, as he might insist, the property yet belonged to the seller? I cannot think such is the law, although these consequences seem to flow from this decision.

Conceding the interpretation which is given to the charge of the County Court by this Court, to be correct, and that it must be understood as instructing the jury "that if the cotton as to quality and condition, was such as represented when sold, then

the contract and order to the warehouse-man, was a sale and delivery." I think it is erroneous for the reasons I have before stated, that the sale was nothing but a *contract* until the *acceptance* of the cotton by the purchaser, and if destroyed previous to such *acceptance*, it then, in contemplation of law, belonged to the seller, whatever may have been his right of action against the purchaser for refusing to receive it. In addition to this error, I think the question of delivery growing out of the giving of the order, was not a question of law, as in effect considered to be by the County Court, but a question of fact, to be determined by the jury according to the intention of both parties in giving and receiving it.

I have before said that we were not now considering whether the plaintiff may not be entitled to a verdict upon the contract of sale, if the cotton corresponded with the sample and description, and was placed at his risk by a tender; however this may be as the case was put to the jury, on what I consider to be an erroneous ground, I think the judgment ought to be reversed.

WATKINS V. BASSETT AND WIFE.

SAME V. MANNING AND WIFE.

SAME V. SAME.

1. When a judgment is improperly rendered against an administrator, the statute judgment consequent on a return of an execution not satisfied, is void also.
2. No execution can issue against the sureties of an executor or administrator, until the return of an execution unsatisfied, against the principal in the administration bond.
3. If such execution issues improperly, it may be quashed, but no writ of error can be prosecuted to reverse it.

Error to the County Court of Madison.

ORMOND, J.—These cases are, in all respects, like the preceding cases of *Taliaferro v. Bassett and wife* and others, ex-

cept that those are prosecuted by the surviving surety to the administration bond of Polly Thompson, executrix of Asa Thompson.

Upon the return of the execution which issued on the judgments v. Taliaferro as the administrator, *de bonis non* of Polly Thompson, of no property found of Polly Thompson in the hands of the administrator, an execution issued against the plaintiff in error, and another (since dead) as the sureties of Polly Thompson to the bond executed by her as executrix of Asa Thompson deceased.

This is supposed to be authorised by the statute: (Aik. Dig. 253, § 40.) "Whenever any execution shall have issued on any decree made by the Orphans' Court, and final settlement of the accounts of executors, administrators and guardians, and is returned by the sheriff, 'no property found,' generally, or as to a part thereof, execution may and shall, forthwith, issue against the sureties of such executors, administrators or guardians."

It has been shown by the examination of the preceding cases before referred to, that there was no power in the Court to render judgment against Taliaferro, the administrator, *de bonis non* of Polly Thompson, not only because the County Court of Madison had no jurisdiction, but also because there was no authority to proceed against him at law for the *devastavit* of Polly Thompson: As, therefore, the judgment was unauthorised, the statutory judgment consequent on a return of the execution unsatisfied, is void also.

But independent of this, it is quite clear, that the execution, to have the effect ascribed to it by the statute, must issue against the person who, as principal, executed the bond; any other construction would make the statute productive of the greatest injustice, as it is only on failure of effects of the principal that the surety is liable to an execution.

But although the execution is utterly void, the writs of error must be dismissed, which has issued in these cases. A writ of error will not lie on these statute judgments. If in such a case an execution improperly issues, it may be superseded and quashed; or if the bond upon which the statute judgment is founded is a forgery, relief may be had in Chancery. *Ex parte Tarlton*, 2 Ala. Rep. 35. and *Taylor v. Powers*, *ante*, 285.

Let the writs of error which issued in these cases, be dismissed.

MCCARTNEY V. THE BRANCH BANK AT HUNTSVILLE.

1. If an affidavit is actually sworn to before the justice who issues the attachment, his omission to certify the affidavit, will not vitiate the proceedings.
2. Although the affidavit states that the defendant will be indebted, yet, if it shows other facts, as by setting out the date and time of payment of the note from which the indebtedness arises, it will be considered as if a present indebtedness was sworn to in direct terms.

Writ of error to the Circuit Court of Madison county.

THIS suit was commenced by attachment, and on its return, the defendant pleaded in abatement, after craving oyer of the affidavit, on which the attachment is founded as follows:

1. That the supposed affidavit is not, nor is any part thereof, in the hand writing of the said justice of the peace; nor is the same certified by the said Joseph A. T. Acklin, or by any other justice of the peace for the county aforesaid, as having been sworn and subscribed by the said Stephen S. Ewing, President of the said Branch Bank, or by any other person; nor was there any such affidavit in writing, as the statute in such case, made and provided, requires, made before the said original attachment was issued, before the said Joseph A. T. Acklin, or any other justice of the peace of the said county, and by him returned to the said Court, with the said writ of attachment, and this he is ready to verify; wherefore, he prays judgment of the said writ of attachment, and that the same may be quashed.

2. Because the writ of attachment was sued out without the said justice of the peace having first required the plaintiff, or their agent, &c. before issuing the same, to make an affidavit in writing, setting forth any sufficient cause or ground within the purview and meaning of the statute, in such case made, &c., to authorise the said justice, &c., to issue the same; nor did the said justice, &c., take, before issuing the said attachment, and return with the same to the clerk's office of this Court, any such affidavit in writing, as is required by the statute, &c., to be made by the party applying for the same, his agent, &c., before

issuing said attachment; and this he is ready to verify; wherefore, &c.

The affidavit set out in oyer, is in these words:

The State of Alabama,

Madison County, to wit:'

Before me, Joseph A. T. Acklin, a justice of the peace, in and for the county aforesaid, personally appeared Stephen S. Ewing, President of the Branch of the Bank of the State of Alabama at Huntsville, who being duly sworn, deposeth and saith, that John McCartney will be indebted to said Branch Bank, in the sum of fourteen hundred and fifty-three dollars and seventeen cents, by note for that amount, dated 9th Nov. 1840, due 120 days thereafter, and that the said John McCartney is about to remove out of this State, so that the ordinary process of law cannot be served on him, and that an attachment is not sued out for the purpose of vexing or harrassing the defendant.

(Signed,) STEPHEN S. EWING, Pres't.

Sworn to and subscribed before me, }
 this 8th day of April, 1841. }
 ———, J. P.

The replication to the first plea asserts, that before the attachment was sued out, an affidavit was made, signed and sworn to, before Joseph A. T. Acklin, a justice, &c., by Stephen S. Ewing, &c., describing the affidavit in the same manner as it is set out in oyer, but omitting to state that it was certified by the justice. This replication concludes to the country.

The replication to the second plea, states the substance of the affidavit, and shows the indebtedness in the same manner as therein described, and also concludes to the country.

The defendant demurred to these replications, and the Court overruled the demurrer, and directed the defendant to plead over, which he refusing to do, judgment was given for the plaintiff.

It should be remarked, that the same questions presented by the pleas in abatement, were presented on a motion to quash the attachment, previous to pleading the pleas, which motion was likewise overruled.

The defendant now prosecutes his writ of error, and assigns the overruling of the motion to quash, and the sustaining of the replication as error.

HUNTINGTON, for the plaintiff in error.

McCLUNG, contra.

GOLDTHWAITE, J.—The motion to quash the attachment, is settled against the plaintiff in error, by the case of Lowry v. Stowe, 7 Porter, 483, and we think that he cannot avail himself of the irregularity of the justice in omitting to sign his name in attestation of the affidavit.

The plea is fully answered by the replication, which asserts that the affidavit, in point of fact, was regularly sworn to and subscribed before the justice of the peace, who issued the attachment. It would have been more regular for the justice to have certified the affidavit, but we are not prepared to say, that his omission to do so, necessarily vitiates the proceedings.

The allegation of indebtedness in the affidavit, is also sufficiently certain; although it speaks in the conditional mode, the reference to the date and time of payment of the note, excludes all inference that the debt was not due when the attachment was issued. It asserts that the defendant would be indebted by note dated 9th Nov. 1840, payable 120 days after date; this shows a debt due in March, 1841, and the affidavit is made in April of the same year.

We have not been able to perceive that there is any error in the record, and the judgment is affirmed.

**REID, SHERIFF, &C AND HIS SURETIES V. THE PLANTERS' AND
MERCHANTS' BANK OF MOBILE.**

1. In a motion against a sheriff and his sureties for failing to pay over money collected upon an execution, notice to the former is sufficient to authorise a judgment against all of them.
2. In a proceeding against a sheriff and his sureties for failing to pay over money collected on execution, unless it is expressly or impliedly waived, the fact of suretyship must appear from the record to have been proved to the Court. But if the sureties appear and submit the case to a jury, their suretyship need not be proved, unless they have denied the execution of the sheriff's bond by plea.
3. The plea of "*not guilty*" by the sheriff to the motion against himself and sureties, does not relieve the plaintiff from the necessity of proving the suretyship of the latter in order to charge them.

Writ of error to the Circuit Court of Mobile.

IN the record we find a notice in which is described a writ of *fieri facias*, at the suit of the defendant in error, against James Walsh and William C. Baldwin, issued on a judgment rendered by the Circuit Court of Mobile. This execution it is alleged, issued on the 10th June, 1840, for fifteen hundred and eleven dollars and fifty-five cents, with interest to be collected thereon, from the 5th of May, preceding its issuance; and also the further sum of eight dollars and twenty-five cents, adjudged and taxed as costs of suit; and was made returnable on the sixth Monday after the third Monday in September, one thousand eight hundred and forty. It is then alledged that the execution was duly placed in the hands of Reid, as sheriff of Montgomery county, who has returned the same "*satisfied*," and failed to pay over the money on application therefor. The notice then informs the sheriff that a motion will be made at the Circuit Court of Mobile, to be holden on the third Monday of April, 1841, by the defendant in error, for a judgment against him and Peter C. Harris, Joseph Fitzpatrick, William Graham, Nimrod E. Benson, John Martin and Thomas Molton, his securities, for the aforesaid sum of fifteen hundred and nineteen dollars and seventy-five cents, with interest on the judgment 'till its collection by the sheriff, together with five per cent.

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damages thereon for each and every month after the 15th of April, 1841, that being the day on which the same was demanded.

The notice was served on Reid alone, who by his counsel, pleaded "not guilty" thereto.

At the term of the Court at which the notice stated the motion would be made, a judgment was rendered as follows, viz :

"The Planters' and Merchants' Bank of Mobile.

v.

J. W. T. Reid.

This day came the parties by their attornies, and it appearing to the satisfaction of the Court, that a writ of execution issued out of this Court, bearing test the 10th day of June, 1840, and returnable to the next term of this Court, to be holden on the first Monday after the fourth Monday of October, 1840, in favor of said Bank, and against James Walsh and William D. Baldwin, for the sum of fifteen hundred and eleven dollars and fifty-five cents, and eight dollars and twenty-five cents costs; and it further appearing to the Court, that said Reid was at the time, sheriff of Montgomery county in said State, and that said execution was directed to said sheriff, and that the money specified therein had been made by the said sheriff: Thereupon, came a jury to wit: Robert W. Smith and eleven others, who being elected well and truly to try the issue joined, upon their oaths do say, we the jury find for the plaintiff, and assess the damages at fifteen hundred and ninety-five dollars and forty-five cents. It is therefore considered by the Court, that the said Bank recover from the said J. W. T. Reid, sheriff as aforesaid, and his securities in his official bond, Peter C. Harris, Joseph Fitzpatrick, W. Graham, N. E. Benson, John Martin and Thomas Molton, the aforesaid sum of fifteen hundred and ninety-five dollars and forty-five cents damages, by the jury aforesaid assessed, together with the costs in this behalf expended."

CAMPBELL, for the plaintiffs in error.

B. F. PORTER, for the defendant.

COLLIER, C. J.—It is insisted that the judgment of the Circuit Court is erroneous,

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1. Because no notice of the motion was given to the sureties of the sheriff.

2. Because the jury did not find by their verdict, who were the sureties; nor does the record show, that any proof on this point, was adduced to the Court.

1. In *Broughton, et al. v. The State Bank*, 6 Porter's Rep. 48, this Court considered it a settled question, that in a motion against a sheriff and his sureties for failing to pay over money collected upon an execution, notice to the former was sufficient to authorise a judgment not only against him, but his sureties also: see *McWhorter, et al. v. Marr's*, Minor's Rep. 376; *Neal, et al. v. Caldwell*, 3 Stewart's Rep. 134.

2. No objection is made to the judgment so far as it is to operate against the sheriff alone, but the question is, do the facts recited in the record sustain it as against the sureties. In *McWhorter, et al. v. Marr's*, Minor's Rep. 376: it was decided that in a proceeding by motion against a sheriff and his sureties for the failure to return an execution, it was indispensably necessary, unless expressly or impliedly waived, that the individuals sought to be charged as sureties, should be proved to be such, and that this fact should appear from the record to have been shown to the Court. And in *Barton, et al. v. The State Bank*, 1 Stew. & Por. Rep. 471. This Court held the same opinion, and re-affirmed the case cited.

It has been repeatedly held from the earliest, up to the most recent decisions of this Court, that in summary proceedings provided by statute, every thing necessary to give the primary Court jurisdiction, and to legalize its judgment, must be shown by the record. *Logwood v. The Planters' and Merchants' Bank of Huntsville*, Minor's Rep. 23. *Bates v. The Planters' and Merchants' Bank*: 8 Porter's Rep. 99. *Levert v. The same*, *ibid.* 104. *Bettis v. Taylor*, *ibid.* 564.

If, however, the sureties appear and submit the case to the jury, it will not be necessary to prove the fact of suretyship, unless they have denied the execution of the sheriff's bond by the plea of *non est factum*. *Jamison, et al. v. Harper*, 1 Por. Rep. 431; *Bettis v. Taylor*, 8 Por. Rep. 564.

In the case at bar, the sureties did not appear, but the sheriff alone pleaded not guilty, which we understand to be a general denial of the allegations made against him in the notice. Un-

der the issue then, it was incompetent for the jury to try the fact of suretyship. But the proper course was, after the jury had returned their verdict, for the plaintiff to have offered evidence to show, that the persons who are described as sureties joined with him in his official bond. No evidence of this kind was adduced, but the Court assumed the fact without proof, and in this, according to the cases cited, mistook the law. The consequence is, the judgment of the Circuit Court is reversed, and the cause remanded, unless the defendant in error assents to the rendition of a judgment against Reid alone, according to the verdict,

ABNEY V. CARTER.

1. No advantage can be taken on error because the damages found by the verdict and judgment, exceed the amount of the note and interest, as described in the declaration.

Error to the Circuit Court of Barbour.

BUTFORD, for plaintiff in error.

ORMOND, J.—The opinion just delivered in the case of *Giles v. Williams*, is decisive of the present case. The defendant being a purchaser of lands in possession, could not defend himself at law when sued for the purchase money, on the ground of defect or want of title in his vendor.

It is not necessary to consider whether the last charge given by the Court, was correct or not, for if erroneous it could not prejudice him.

It is also assigned for error, that the damages awarded exceed the amount of the note and interest. In the case of *Moore v. Coolidge*, 1 Porter, 283, it was held that where the judgment corresponded with the verdict, no relief could be had on error, because the verdict and judgment was for a larger amount than the note with interest computed thereon, recited in the de-

claration. The reasoning of the court is, that the presumption that the verdict and judgment were wrong, rested on the hypothesis that the statement of the instrument sued on in the declaration was correct; which although probable, was not sufficiently certain to set aside the verdict, and that the proper remedy in such a case, was to move the Court for a new trial. That case is decisive of this, and the judgment is therefore affirmed.

GRAY, et al. v. DENNIS

1. The act of the Legislature which confers upon Judges of the County Court within their respective counties, power concurrent with the Judges of the Circuit Court, to grant writs of *certiorari* and *supersedeas*, does not authorise a Judge of the former Court to supersede an execution issued by a justice of the peace, unless the *supersedeas* issue as ancillary to a *certiorari* which removes the cause from the justice, for a trial *de novo*.

This cause comes here by writ of error from the Circuit Court of Autauga.

THE plaintiffs by their petition, addressed to the Judge of the County Court of Autauga, stated, that an execution had been issued against them by William Price, a justice of the peace of that county, for the sum of thirty-six dollars and forty cents, besides costs; which execution appeared upon its face to be founded on a judgment rendered by James H. Gorman, a justice of the peace of the same county. The plaintiffs further stated, that Gorman was still in office, in possession of all the papers and entries pertaining to the case in which the judgment was rendered; notwithstanding, all which, Price had issued the execution returnable before himself. The petition then concludes with a prayer that a *certiorari* may issue to remove the proceedings into the County Court, and in the meantime the execution be superseded. An order was made in conformity to the prayer of the petition, and a *certiorari* directed

to Price, who certified two executions issued on the judgment, one by Gorman, on the 2d April, 1839, the other (the execution complained of,) by himself, on the 28th August, 1839.

At the return term of the *certiorari*, the County Court, on the motion of the defendant, dismissed the petition of the plaintiff and all proceedings consequent thereupon, on the ground that all the papers of the justice had not been sent up. To revise the judgment of the County Court, a writ of error was sued to the Circuit Court and the same there affirmed; and it is that judgment of affirmance which is here sought to be reversed.

POPE, for the plaintiff in error.

PRYOR, for the defendant.

COLLIER, C. J.—The petition of the plaintiffs to the Judge of the County Court, doubtless proceeds upon the idea, that the statute which declares “the Judges of the County Courts within their respective counties shall have full power, concurrent with the Judges of the Circuit Courts to grant writs of *certiorari* and *supersedeas*” &c. extends so far as to authorise the former Court to supersede an execution, issued by a justice of the peace. This question came directly before the Court, in *Boyd v. Woodfin*, 3 Stewart’s Rep. 357. And it was there said, although the law authorizes the Judge of the County Court to issue writs of *certiorari* and *supersedeas*, it is only for the purpose of removing a cause from a justice’s jurisdiction, in order that the party complaining may have a trial *de novo*. The statute confers no authority, other than that of a trial upon the merits, and the statute which gives the County Court authority to supersede its own executions, cannot be extended to executions issued by justices of the peace. And in *Wheelock v. Wright*, 4 Stew. and Por. Rep. 163, it was decided that a petition for a *certiorari*, which relies upon matters occurring subsequent to the judgment by a justice of the peace, ought not to be granted, and if granted should be dismissed: see also *Bobo and Johnson v. Thompson*, 3 Stew. and Por. Rep. 385.

The case made by the plaintiffs is nothing more than an objection to an execution, because it was issued by a justice of the peace who did not render the judgment, while no objection is made to the judgment itself. It was then an application to the

County Court to supersede the execution, and the cases cited are decisive to show, that the plaintiffs petition should not have been entertained. The County Court, did not, it is true, repudiate the case for the reasons we have stated to show its want of jurisdiction, but its conclusion being correct, we will not undertake to scan the reasoning by which it was attained.

The judgment of the Circuit Court must be affirmed.

BORLAND v. PHILLIPS, *et als.*

1. Proof that a judgment was rendered in a suit by B. against the executor of P., and that the note on which the suit was founded, was executed by P., and that the record had been destroyed by fire, is not sufficient evidence to prove the identity of the note in a suit in chancery, in which the judgment was not evidence of the original debt. First, because the note itself was not produced, nor its absence sufficiently accounted for by proof of the destruction of the record; the note not being a necessary part of the papers of the cause. Second, because there was no proof of the identity of the note when made, to whom, and by whom made, for what amount, and when payable, without reference to the judgment, which was not evidence for any purpose, and could only have been looked to to refresh the memory of the witness.
2. The bill alleged, that on the 4th Nov. 1818, the testator of the defendant for a valuable consideration, with one E. E. Parks, made his note to the complainant for five thousand dollars, payable sixty-one days after date, at the branch bank at Milledgeville; that the note was negotiated and discounted at the bank, and the money obtained by the deceased, and that the complainant was afterwards compelled to purchase up the note from the bank; held, that this allegation did not show an original indebtedness from the deceased to the complainant, evidenced by the note, but must be understood to mean that the note was made to be discounted in the bank for the purpose of raising money, and that the complainant paid it to the bank as endorser; otherwise the payment would be voluntary, and would create no legal obligation.
3. That such being the allegation, proof of the note, merely, would not establish the liability of the maker of the note, but that it was necessary to go further, and to prove the payment of the money to the bank.
4. A decree cannot be made out of the scope and design of the bill, and especially against an infant, against whom no relief is prayed, and who is not liable immediately.

Error to the Chancery Court at Monroeville.

THIS was a bill in Chancery, filed by the plaintiff in error,

to subject the lands of Joseph Phillips, in the hands of his devisees and others, to the payment of a debt alleged to be due from him to the complainant.

The record is very voluminous, but need not be recited, as the case turned on a single point, the sufficiency of the proof to establish the debt alleged to be due from the deceased, and which is described at length in the opinion of the Court.

WILLIAMS, for plaintiff in error, upon the point on which the cause turned, insisted that the judgment obtained at law by the complainant, against the executor of Phillips, was evidence for some purposes, and at all events, that it was evidence of the debt as against the executor and his heirs. He cited the opinion of this Court when the case was here before, 3 Porter, 9. But at least, he insisted the debt was proved independant of the judgment by the evidence of Mr Parsons, that the loss of the note on which the judgment was founded, was sufficiently accounted for by the destruction of the records, by the burning of the court-house, and death of the clerk.

HOPKINS and SAFFOLD, contra, insisted that there was no legal evidence of the existence of a judgment against the executor, but that if there was, it was not evidence against the devisees of the deceased, as there was no privity between them and the executor, as was determined when the case was in this Court before; 3 Porter, 9.

That the proof of Parsons was insufficient to establish any thing; that the note, the supposed evidence of the debt, was not produced, nor its absence accounted for; that his testimony was uncertain, and entirely insufficient.

That at all events, the bill could not be maintained as to Saffold and wife, as to whom it had been dismissed in 1833, which decree was still in force.

ORMOND, J.—This bill was filed by the complainant, in the year 1826, to subject the lands of Joseph Phillips, deceased, in the hands of his heirs and devisees, to the payment of a debt due from him to the complainant, upon the ground, that by his will, the deceased had charged his lands with the payment of his debts.

In the year 1833, a final decree was made in favor of the com-

plainant, from which the defendants appealed to this Court, by which the decree was reversed, and the cause remanded for further proceedings. See the case reported, 3 Porter, 9, by the name of Darrington v. Borland.

By the decision then made, several questions of law presented on the record were settled, and must be considered the law of this case, as has been repeatedly held in this Court.

The debt alleged to be due the complainant, as stated in the bill, arose out of a transaction in the State of Georgia, in the year 1818.

It is alleged, that the deceased, "on the 4th Nov. 1818, for a valuable consideration, made and delivered to your orator, his certain promissory note, for the sum of five thousand dollars, which note was also signed by one Ezekiel E. Parks, and made payable to your orator, sixty-one days after date, at the branch bank in Milledgeville. Your orator further charges, that the said note was negotiated and discounted in said bank, and the money obtained by the said Joseph Philips; and your orator was afterwards compelled to purchase up from the bank, said note of five thousand dollars, with the interest which had accrued thereon, and to pay said bank therefor."

It is further alleged, that in 1822, the complainant commenced suit on the note in the Circuit Court of Monroe county, against Zeno Philips, executor of Joseph Philips, and at the March term, 1825, recovered a judgment for seven thousand four hundred and eighty-three dollars and thirty-three cents, besides costs, to be levied of the goods and chattels of the deceased, in his hands to be administered, and that the execution which issued was returned, no "property found."

This Court, after a most elaborate examination, among other things, held, that as there was no privity between the executor and the heirs, or devisees of the testator, a judgment against the former was no evidence in a proceeding against the latter, to subject real estate derived from the testator, to the payment of his debts, further than to repel a defence under the statute of non claim, but the original justice and continuing obligation of the debt alleged to be due from the testator, must be established.

The cause having been remanded, a reference was again made to the master to ascertain the debt due by the deceased

to the complainant, who reported a debt to be due, of upwards of sixteen thousand dollars. The report, and the evidence upon which it is founded, was excepted to, and appears in the record. So far as it relates to the debt, it consists of the testimony of Enoch Parsons and A. B. Cooper, Esquires.

The former testified, that at the March term, 1825, of Monroe Circuit Court, the complainant recovered a judgment against Zeno Philips, executor of Joseph Philips, for the amount stated in the bill, which judgment was founded on a promissory note, signed by said Joseph Philips; that he had seen him write, and believed it to be the note of Joseph Philips. That in 1833, the court-house of Monroe county, in which was kept the offices of the clerks of the Circuit and County Courts, was burnt, and all the interlocutory orders and decrees made in this cause, destroyed.

Mr Cooper proved the burning of the court-house of Monroe county, and the destruction of the records, except the papers of this cause; that he once saw the entry of a judgment against the executor of Philips, that an execution issued thereon, was returned no property found. He also proved the genuineness of the first report made by the master, Samuel McColl, previous to the reversal in this Court.

This evidence, both Chancellors Bowie and Crenshaw, who at different times passed on the report of the master, considered insufficient to establish the debt, charged in the bill to be due from the deceased to the complainant, and of that opinion is this Court.

The report of the master, made previous to the reversal of the cause, cannot be looked to for any purpose. The first decree was reversed in part, on the ground that the master was incompetent to act in that capacity, being also *guardian ad litem* to the minors. The judgment against the executor, admitting that it is satisfactorily proved, being no evidence against the defendants in this suit, the only remaining testimony is, the brief statement of Mr Parsons, that *the judgment was founded on a note which, from having seen the deceased write, he believed to have been executed by him.*

The first objection to this testimony is, that the note itself is not produced, or its absence accounted for. It has been urged, we must presume that it was destroyed with the records in the

clerk's office, but it is not shown that it was filed with the record, or any fact proved to raise that presumption. It is true, that it is frequently done, but it is not necessary that it should be so filed, and therefore no presumption can arise, that it was destroyed at the burning of the court-house, merely from the destruction of the record of the cause. Again, the note described by Parsons, does not correspond with the note described in the bill; that was a note made by the deceased and one Parks, and the note described by Parsons, is the individual note of the deceased. Its date, when payable, to whom payable, for what amount, and all other distinguishing characteristics are omitted, nor does the witness pretend that he has any knowledge on these points, further than that the judgment which he has described, was founded on a note. But as the judgment itself was not evidence, it could only have been referred to for the purpose of refreshing the memory of the witness, and is not in itself, evidence for any purpose. Yet, if we strike from the testimony of the witness, all that relates to the judgment, there will be nothing left, but that he once saw a note made by the deceased to the complainant, its date, to whom, and when payable, and for what amount, are all left in a state of uncertainty. It is too clear for argument, that such a statement would not prove the allegations of the bill.

There is, however, if possible, a more formidable objection than this, to the testimony.

The charge in the bill relating to the indebtedness of the deceased, seems to have been designedly involved in obscurity.— Thus it is first stated, that the note for five thousand dollars was executed by the deceased, and one Parks, for a valuable consideration, to the complainant, payable sixty-one days after date, at the branch bank at Milledgeville. It is then alleged, that this note was negotiated at, and discounted by the bank at Milledgeville, *and the money received by the deceased*. It is not stated that the deceased did not pay the bank at the maturity of the note, but the allegation is, "that your orator was afterwards compelled to purchase up from the bank, said note of five thousand dollars, with the interest which accrued thereon, and to pay the bank therefor."

It is not easy to conceive how any one could be compelled to purchase the note from the bank, nor indeed does it appear

very clearly from the statement of the case, that the complainant was under any obligation to *pay* it.

He describes himself as the payee of the note, but in that character, he was under no obligation to pay it, the note being negotiated, and the money received by another. If he paid the note voluntarily, and without being under a legal obligation to do so, he could not have enforced its payment from the deceased, or from his heirs or devisees, as the case will not permit one to make himself the creditor of another, without his consent; as, therefore, it is not shewn by the bill that the complainant was compelled to pay the bank, from being a party to the note, or that he paid it at the request of the deceased, the allegations of the bill, literally interpreted, do not show any indebtedness on the part of the deceased.

The only hypothesis upon which such an indebtedness could arise, consistent with the allegations of the bill, is, that the note was made to be discounted by bank, for the purpose of raising money, and that to accomplish this object, the note was made payable to the complainant, and indorsed by him. In this event, on the failure of the maker, he would be responsible to the bank, and might with propriety, have paid the debt.

This transaction is considered in the bill, a *purchase* of the note, but it is very clear, that by the payment to the bank, the note was extinguished, and could not afterwards be the foundation of an action, as was held by this Court at this term, in the cases of *Foster v. The Athenæum*, and *Fletcher v. Gamble*. By the payment, the complainant became a simple contract creditor of the deceased, and could have maintained an action against him to recover the amount so paid; not on the note, but for money paid to his use, and as his surety.

If, therefore, the note had been produced, and proved to have been executed by the deceased, it would have availed nothing in this view of the case, without the further proof that the deceased failed to pay the bank, and that the complainant being under a legal obligation to do so, paid the amount due on the note. Nothing of this kind was attempted to be proved, nor is it probable, was intended to be proved, as is evinced by the structure of the bill, which seems to have been framed with the view of superseding the necessity of such proof, by resting

the claim, not on the payment of the money to the bank, but upon the evidence afforded by the note itself, and the judgment obtained upon it against the executor.

Whether the possession of the note would not have been *prima facie* evidence that the holder had paid it, if the allegations of the bill had been, that as endorser, he was obliged to pay it, upon the default of the maker, it is not necessary to determine, because there is no such allegation in the bill, and because there is no proof of the identity of the note on which the judgment was founded, with the note described in the bill.

That the view here taken of the manner in which it must be understood, from the obscure allegations of the bill, the alleged indebtedness of the deceased to the complainant arose, is correct, there cannot be a reasonable doubt. It is not pretended that the deceased was indebted to the complainant when he executed the note described in the bill, nor is that supposition at all to be reconciled with the fact that the note was discounted at bank for, and the money received by, the deceased. In no possible aspect, however, in which the case can be viewed, will the proof offered, be evidence of any indebtedness on the part of the deceased, in this proceeding, and against these defendants. Whether its origin was money paid by the complainant for the deceased, and as his surety, or whether it was a direct indebtedness from the deceased to the complainant, in either event, there is no proof to sustain it.

It is, however, urged, that the judgment obtained by the complainant against the executor, who was a devisee under the will, was at least evidence against him, and those in privity with him.

The original bill was filed against Zeno Philips, the executor of Joseph Philips, and the other heirs and devisees, to compel a payment of the debt alleged to be due from Joseph Philips, by sale of the lands of the deceased, in the possession of the devisees and others, to whom it was alleged it had been improperly sold by the executor. It is alleged that the executor acted fraudulently in the administration of the estate, and carried with him to Texas a number of negroes and other personal property of the deceased.

After the decree made in this Court in 1833, a supplemental bill was filed, which alleges that Zeno Philips has departed this

life, leaving a wife and some minor children, whose names are unknown, but the bill was afterwards amended, so as to make Sarah E. Philips, only child of Zeno Philips, a party to the bill, who being a non-resident, an order for publication was made, and a guardian *ad litem* appointed, who answered the bill.

It may be conceded that the judgment obtained against the executor, is evidence against him, and all who are in privity with him, of the debt alleged to be due from the deceased to the complainant, but that alone will not authorize a decree against the heir of the executor.

The bill does not seek to charge lands in the hands of the executor or his heir, who, it is admitted, in the bill, are non-residents, without any property, or effects in this State. Its precise object is, to charge the lands of Joseph Philips, in the hands of the devisees and others, to whom they were improperly sold by the executor, on the ground, that by his will, the testator had subjected his lands to the payment of his debts. If the allegations of the bill had been sustained, the decree must have been for a sale of the lands, nor could a decree be made for the rents and profits of the lands, unless the sale of the land was insufficient to satisfy the debt, as was held by this Court, when this case was last here.—3 Porter, 42.

No decree, therefore, can be made in this case, against the heir of Zeno Philips, because there is nothing upon which the decree can operate. It is not only not shown that any of the lands of Joseph Phillips are in the possession of the heir of Zeno Philips, or that she has any claim thereto, but it is expressly alleged, that she has no property whatever within this State.—The bill does not seek, and could not ask a decree against her individually, nor can any such be made, whatever may be the responsibilities of the legal representative of the executor, her father, in consequence of his wasting the estate of Joseph Philips.

A great many questions were argued at the bar with great ingenuity on both sides, which we have not considered necessary to examine, because the view here taken, disposes of the entire case. There being no sufficient evidence of the debt, to satisfy which the bill was filed, it is obvious that the bill must fail, and that all other questions connected with the complainant's right to recover, become unimportant.

It may, however, be proper to remark, that no notice has been taken of the admission in the answer of the defendant, Saf-fold, that he believed the deceased was indebted to the complainant, but in what amount he did not know, because such an indefinite admission really proved nothing; and that if the admission was of any value to the complainant, it could not operate against the other defendants to the suit; and that it could avail nothing against him, because, as to him and his wife, the bill was dismissed in 1833, which decree has been acquiesced in by the complainant; is now in full force, and from the lapse of time, cannot be revived.

Notwithstanding we have attained the conclusion that the debt alleged to be due from the deceased to the complainant, is not sustained by proof, we think it probable that a claim of some description, at one time, existed. Whether he has failed to prove it, because the lapse of time had deprived him of the means of establishing it, or whether the failure has arisen from negligence, in either case, the result must be the same. By the former decision of this Court, and by the subsequent decision of Chancellor Bowie, referring back the report of the master, because the debt was not sufficiently proved, the complainant was distinctly admonished of the exigency of the case, and the insufficiency of the testimony to establish the debt. He has adduced no further proof, because, in all probability, he cannot, although he has been pursuing the claim for twenty years, sixteen of which has been spent in the Court of Chancery.

The suit in Chancery is not exempt from the common lot; even that must have its termination; and if we could with justice to the defendants, dismiss this bill without prejudice, we should not consider this a proper case for the exercise of such a discretion; as the presumption after such a protracted litigation must be, that all the evidence has been offered which it is in the power of the party to produce. That which he has offered, though it may raise a suspicion of indebtedness, does not prove the existence of a debt.

Our conviction is, that the decree of the Chancellor, dismissing the bill, for want of proof of the existence of the debt alleged to be due from Joseph Philips, is correct, and it is therefore affirmed.

ADAMSON V. PARKER, et al.

1. Process intended to be executed by the coroner should be directed to him *eo nomine*; but where a writ directed to the sheriff is executed by the coroner, it will be intended, after a judgment by default, that the direction was proper, and the process received by the sheriff; and as the duties of sheriff, in the event of a vacancy in the office, are devolved upon the coroner by statute, that the contingency had happened and the process was received by the coroner from the sheriff's office.
2. A coroner in discharging the duties of sheriff, may appoint a deputy; and where a writ is returned "executed, H. J. P. cor. by R. E," the reasonable inference is, that R E was authorised to act for the coroner.
3. Where a writ issues otherwise than prescribed by law, it must be abated on the plea of the defendant.

Writ of error to the Circuit Court of Tallapoosa.

THIS was an action of *assumpsit* on a promissory note. The writ is addressed "to any sheriff of the State of Alabama," and was returned "executed by H. J. Pickard, cor. by R. Es- py." Judgment being rendered against the defendant by default, he has prosecuted a writ of error to this Court.

T. CLAY, for the plaintiff.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—There can be no question, that process intended to be executed by the coroner, should be directed to him *eo nomine*. The statute of 1839, entitled "An act to regulate judicial proceedings," is explicit on this point. But there is nothing in the record to show, that the writ issued in the present case, was not placed in the hands of the sheriff for execution, and went from thence to the coroner, because the office of sheriff became vacant. Now the act of 1826, "the better to secure money in the hands of clerks, sheriffs and coroners," (Aik. Dig. 389,) expressly devolves upon the coroner, the duties of a sheriff in the event of a vacancy in the office of the latter. This being the case, we apprehend that it would be competent for the coroner to execute all process remaining in the sheriff's hands unexecuted, at the time the office was vacated.

That the coroner executed the writ in obedience to law, is but a reasonable presumption, in the absence of any thing to the contrary.

Although the return does not express the character in which "R. Espy" executed the writ, yet as he appears to have represented the coroner, it must be intended that he was regularly authorised to act. And that the coroner in the discharge of the duties of a sheriff, may appoint a deputy, cannot, as we think, be seriously questioned.

But we need not reason to show, that the proceeding complained of, is *prima facie*, regular. In *Nabors v. Thomason*, 1 Ala. Rep. 590, it was decided, under the influence of a statute of this State, (Aik. Dig. 278,) that where a writ issues in any other mode than prescribed by law, it must be abated on the plea of the defendant: see also *Nabors v. Nabors*, 2 Porter's Rep. 162; *Jordan v. Bell*, 8 Porter's Rep. 53.

The objection we are considering does not go merely to the manner in which the writ was executed, but to the writ itself. The cases cited, are analogous in principle to the present, and serve to show, that to authorise the plaintiff in error to insist upon the irregularity, he should have interposed a plea in abatement in the Court below.

The judgment of the Circuit Court is consequently affirmed.

ABERCROMBIE V. KNOX, SNODGRASS, *et als.* AND CROSS BILL OF
RIDDLE V. ABERCROMBIE AND OTHERS.

1. The holder of a bill of exchange may sue all the parties to the bill, or either, at his election, but can have but one satisfaction.
2. The mere omission to sue any party to the bill, or the failure to sue out execution against any prior party to a bill, will not discharge the liability of a subsequent party; but to produce that result, there must be an agreement by the holder with such prior party, on sufficient consideration for delay, by which he has tied up his hands from proceeding.

3. An allegation that a sum of money, which has been paid, has not been credited on the execution, is not sufficient to give a court of chancery jurisdiction, unless it is also charged, that the plaintiff refuses to enter the credit on the execution, or that he is attempting to enforce payment a second time.
4. A creditor cannot be compelled to exhaust his remedy against the principal debtor before he resorts to the surety, unless under peculiar circumstances, rendering it proper that a court of chancery should interfere.

Appeal from the Chancery Court at Talladega.

THE bill states that one Walker drew a bill of exchange on the defendant Riddle, for three thousand five hundred and twenty dollars forty-three cents, payable at the Bank at Montgomery, which bill was accepted by Riddle; and which at the instance and persuasion of Riddle, and on his assurance that there was no risk, complainant indorsed it; that the bill was also indorsed by T. Maddox and D. Conner,—and afterwards and in the regular course of trade, became the property of Knox, Snodgrass & Co. The bill not being paid at maturity, separate suits were brought thereon against all the parties to it by the holders. The complainant alleges, that after judgment was obtained against Walker, he applied to Knox & Snodgrass for leave to cause the money to be made from Walker, the drawer, which they refused; that if execution ever issued against Walker, it was not acted on, and that Walker, Maddox, and Conner, are now reported insolvent. That execution having issued against complainant, he prosecuted a writ of error to the Supreme Court, which was dismissed. That a *fi. fa.* also issued against Riddle, and a small part of the money made thereon, after which Riddle also prosecuted a writ of error to the Supreme Court, which was dismissed.

Alleges that it was alone from the persuasion of Riddle, that he indorsed the bill, and that Riddle and his sureties in the writ of error bond are indemnified against loss, and that the money paid by Riddle, was out of funds provided by Walker. The prayer of the bill is, that the money be collected from Riddle, and that the plaintiffs at law be enjoined from proceeding against him, until it is ascertained that the money cannot be made from Riddle, or his security, for the writ of error.

Riddle in his answer, admits the facts relating to the making of the bill, but denies that he induced the complainant to indorse the bill. Denies that he is indemnified by Walker—has

paid twenty-two hundred and fifty-six dollars, of which but two hundred and seventy-five were paid by Walker. That he accepted the bill for the accommodation of Walker. That the design of the sheriff in levying on property of the complainant, is to compel complainant and respondent to pay each a portion of the debt. The facts stated in the answer are relied on in a cross bill, and in addition, that thirteen hundred dollars has been paid by him, and not credited on the execution. That Knox & Snodgrass, instead of collecting the money rateably from all the parties to the bill, insist on collecting it from him entire. The bill prays an injunction, which is granted.

Knox & Snodgrass in their answers state, that they are bona fide holders of the bill for a valuable consideration; that they know nothing of the motives of those who became parties to the bill; admit that complainant applied for the control of the judgment against Walker, which was refused, unless the debt was paid; admits the receipt of a part of the money, and that another sum is in the hands of his attorney—denies all fraud, &c.

These causes coming on to be heard together, the Chancellor dissolved the injunctions, from which both parties prayed an appeal, which was granted.

RICE, for Abercrombie—contended, that the acceptor of the bill was primarily liable, and that as it appeared the money could be made from him, it was inequitable to coerce it from the indorser, especially as the acceptor was indemnified. That the refusal of Knox & Snodgrass to permit the complainant to run the execution against Walker, the drawer discharges them from all liability as Walker is now insolvent. He cited, 16 Johns. 175; 10 ib. 586; 4 ib. 129; 17 ib. 384, 9 Porter, 384; 1 Maddock, 235; 16 Johns. Rep. 70; 4 John. C. Rep. 123; 2 ib. 202.

B. F. PORTER, for Riddle.

COCHRAN, for Knox, Snodgrass & Co.

ORMOND, J.—There is no equity in this bill so far as it relates to the holder of the bill of exchange, Knox & Co. The acceptor of the bill is certainly primarily liable, and the liabili-

ty of the other parties to the bill, as it regards the holder is conditioned upon his default. If at the maturity of the bill, the acceptor refuses to pay on demand, and the drawer and indorsers are duly notified of the fact, each of them becomes absolutely responsible to the holder for the amount of the bill; and he may prosecute a suit for its recovery against one or all of them, at his election, although he can have but one satisfaction.

This, it appears, he was doing, when arrested by the injunctions awarded at the instance first of the first indorser, and secondly, at the instance of the acceptor of the bill. As between the parties to the bill themselves, in adjusting their several responsibilities, the acceptor is primarily responsible for its payment and answerable over to any party, subsequent to him on the bill, who may be compelled to pay it. It is for this reason, that every party to a bill, is in the nature of a surety, for all those whose liability on the bill is precedent to his; and therefore a valid agreement, entered into by the holder with such prior party for delay of payment, will be a discharge of the liability of all parties subsequent to him on the bill.

To produce this result, there must be an agreement, on sufficient consideration, by which the holder disables himself from suing or proceeding to collect the money; the mere omission to sue or failing to sue out execution, will not have this effect. But even this pretext does not exist in this case; the holders appear to have been actively pursuing all the parties on the bill. When they attempt to coerce payment from the first indorser he meets them with the objection that they must look to the acceptor; that he is *primarily* responsible, and besides has a fund appropriated for the payment of the bill by the drawer; when they turn round to the acceptor, he informs them that he is a surety as well as the first indorser, and that the money must be made in equal portions from both. Without stopping now to inquire whether an accommodation acceptor can be considered in the light of a co-surety with an accommodation indorser, without an agreement between them to that effect, it is perfectly clear that the creditor is not obliged to exhaust his remedy against the principal debtor before he resorts to the surety, even in the case of a suretyship proper, which is not the fact here, so far as the holder of the bill is concerned. The case of *Hayes v. Ward*, 4 Johns. Chan. 123, cited to maintain

the contrary doctrine, is not an authority that way, but was decided on the peculiar circumstances of the case, whilst the general rule is admitted to be as here laid down. The facts of that case were peculiar, and it is very clear from the reasoning of the Chancellor, that he felt he was treading on doubtful ground, as he distinctly admits that there was no such general rule as is here contended for, and puts the case explicitly on the fact, that the conduct of the creditor, was such as to justify the belief, that the contract he was seeking to enforce against the surety, was invalid from usury, and that if the surety was compelled to pay, he could not recover from his principal. The amount of the decision then is, that cases may possibly exist, in which a Court of Chancery will interfere, and compel a creditor to proceed against the principal debtor before he resorts to the surety. No such fact exists in this case, and there is therefore no warrant for the interference of a Court of Chancery

Much stress was laid in the argument on the fact, that the complainant requested the holders of the bill, to permit him to run the execution against the drawer, which they declined. In the answer, one of the parties denies all knowledge of the fact; the other admits the request, and says, he offered to give the complainant the control of the judgment, if he would discharge the debt by the payment of the judgment against him, otherwise, he declined interfering with the matter in the hands of his attorneys. This was all the complainant had a right to ask, and all he could have obtained if he had filed a bill in chancery for that purpose.

The only fact charged in the bill, having the semblance of equity, is in the cross bill of Riddle, where it is charged that a sum of money collected from him by garnisheeing one of his debtors, is not credited on the execution; but it is not stated that any attempt is making to collect the money again, or that Knox & Co. refuse to allow the credit on the execution; or that any application has been made for that purpose; and if it were conceded that the Court out of which the execution issued, could not afford a summary and cheap redress, there is no pretence for invoking the expensive and dilatory aid of a Court of Chancery, unless it appeared satisfactorily that Knox & Co. were attempting a second time, to coerce payment. This is not

shown, by the mere fact that the credit is not entered on the execution. It will be time enough to attribute such fraudulent conduct to the plaintiff at law, when they attempt a second time to make the money, or refuse, on application, to enter the credit on the execution.

Whatever may be the rights of these parties, as between each other, as it regards the plaintiffs at law the bill is entirely destitute of equity, and the decree of the Chancellor, dissolving the injunction, is therefore affirmed.

SHROPSHIRE V. SHEPPERD.

1. S agreed with R to furnish the goods of a mercantile establishment, which the latter undertook to sell, and receive for his services one half the profits; R furnished none of the goods, nor was he liable for any loss: *Held*, that R was not an ostensible partner of S.
2. It is not necessary to join a *dormant partner*, with an ostensible partner in an action against a person who dealt only with the latter.

THE defendant in error, declared against the plaintiff in the Circuit Court of Tallapoosa, for goods, wares and merchandize sold and delivered. The cause was tried on the pleas of *non assumpsit*, payment and former recovery.

On the trial, the plaintiff introduced one Rodgers as a witness, who executed to him a release of all his interest in the subject matter of the suit. The witness stated that a contract existed between himself and the plaintiff, whereby the latter was to furnish the goods of a mercantile concern, which goods the former was to sell, and in consideration of his services, he was to receive one half of the profits arising therefrom. The witness furnished none of the goods, and was not liable for any losses incurred in the prosecution of the business. Whereupon the defendant's counsel prayed the Court to charge the jury, that if they believed the statement of the witness, then he (the witness) was a co-partner of the plaintiff, and not being joined in the prosecution of the suit, the action could not be maintain-

ed, but they must find for the defendant; which charge, the Court refused to give: and thereupon, the defendant excepted.

A verdict being found for the plaintiff, and judgment thereon rendered, the defendant has sued a writ of error to this Court.

T. CLAY, for the plaintiff in error—cited Collyer on Part. 2, 8, 9, note (O) 14, 43; 1 McC. Chan. Rep. 218; 6 Conn. Rep. 347; 3 H. & Johns. Rep. 505; 19 Ves. Rep. 459.

HEYDENFELDT, for the defendant—relied upon Lloyd v. Archbowle, 2 Taunt. Rep. 324.

COLLIER, C. J.—We infer that the bill of exceptions recites all the evidence, which tended to establish a partnership between the witness and the plaintiff below. Without undertaking to consider, whether the facts are such as to show a partnership, so far as third persons are concerned, we are satisfied they do not warrant the conclusion, that the witness was an ostensible partner; and it may be conceded that he was a dormant partner, without affecting in any manner, the propriety of the refusal of the Judge of the Circuit Court to charge the jury as prayed. It has been repeatedly held, that it is not necessary that a *dormant partner* should join with an ostensible partner in an action against a person who dealt only with the latter. Collyer on Part. 393; Lord v. Baldwin, 6 Pick. Rep. 548. In the present case, there is no evidence in the record, that the defendant purchased goods of the witness as a tradesman, carrying on a business in which he was interested; and in the absence of proof to this point, we can make no such intendment.

No objection was made in the Circuit Court to the competency of the witness, but his testimony was permitted to be given without objection, and the Court was then asked to charge, that if true, he was a partner of the plaintiff, he should have been joined in the action. This charge, we have seen, was rightfully refused; and the consequence is, the judgment is affirmed.

THE STATE V. FILLYAW.

1. The penalty provided by law, for keeping a billiard table for play without a license, can only be enforced by a *qui tam* action at the suit of an informer.

Error to the Circuit Court of Barbour.

THIS was an indictment against the defendant, for setting up and using a billiard table for play, without first obtaining a license therefor, contrary to the statute, &c. The jury found the defendant guilty, and assessed his fine to one hundred and fifty dollars. The defendant moved in arrest of judgment on the ground,

1. That keeping a billiard table for play was not an indictable offence.

2. That the penalty for a violation of the statute was only recoverable at the suit of a common informer.

The Court refused to arrest the judgment, but reserved the questions of law for the revision of this Court, as novel and difficult.

THE ATTORNEY GENERAL, for the State.

LEWIS, contra.

ORMOND, J.—The indictment in this case cannot be sustained. The penalty for keeping a billiard table for play, without license, is the sum of “four thousand dollars, to be recovered in any Court having jurisdiction thereof, one half to the person for suing the same, and the other half to the State,” Aik. Dig. 411. The act of January 9th 1836, which abolishes taxation in the State for the support of the government, retains this tax on billiard tables; it is therefore certain that the only mode in which the penalty can be enforced, is by a *qui tam* action at the suit of an informer.

The judgment must therefore be reversed.

DUPREE & HAMPTON v. SMITH.

1. A writ issued against two defendants, and was returned executed generally, but there was another return, certifying that one of the defendants was not found; a second writ, similar to the first, was issued returnable to the next term, and executed on the defendant not previously served. At an adjourned term, holden about three months after the second writ was served, a judgment was rendered against the defendants by their omission to gainsay the action: *Held*, that the first writ was not executed on both the defendants; that the term to which the second was returnable, was the appearance term, and that at which the judgment was rendered was a mere continuation of it.
2. The act of February, 1839, "to abolish attorneys fees in certain cases," inhibits the rendition of a judgment in an action brought for the collection of money, at the appearance term; unless it be by *express* consent.

THE defendant in error on the first day of October, 1839, caused to be issued from the Circuit Court of Cherokee, a writ of *capias ad respondendum*, against the defendants, with a view to the recovery of a promissory note, of the following tenor:

"\$120.—On or before the first day of February, 1839, we promise to pay Silas Smith, or bearer, the sum of one hundred and twenty dollars, for value received, this 8th February, 1838.

WILLIAM S. DUPREE,

WADE HAMPTON."

On this writ, the sheriff made the following indorsements:

"Came to hand 1st Oct. 1839. Executed the 2d Oct. 1839.

M. H. HUGHES, sheriff, by his deputy

W. F. MEANS.

"Dupree not found in my county, Oct. 2, 1839.

M. HUGHES, sheriff, by his deputy,

W. F. MEANS."

On the 1st day of April, 1840, another writ, similar to the first, was issued returnable to the spring term of the same Court. This writ was placed in the sheriff's hands on the day of its issuance and executed the same day. On the 10th March, 1840, the plaintiff filed a declaration against both the defendants, entitled as of the spring term, 1840. At an adjourned term of the Court, holden in July, of the same year, a judgment was rendered against the defendants for the amount of the note, with interest and costs, which recites that the parties came, by

their attorneys, and the defendants say nothing in bar or preclusion of the plaintiff's right of action.

To revise this judgment, the defendants have sued a writ of error to this court.

MOORE for the plaintiffs in error.

WM. B. MARTIN, for the defendant.

COLLIER, C. J.—Though the first writ is returned executed generally, we must consider it as served on Hampton alone, because the Sheriff returns specially that Dupree was not found. And the object of the second writ although it is not professedly an *alias*, was intended to bring Dupree before the court.—In this view of the case, the spring term 1840, was obviously, the appearance term, and the first at which the parties could make up their pleadings.

The adjourned term of the court holden in July, 1840, at which the judgment was rendered, was but a continuation of the preceding term, so that in effect the judgment was rendered without the intervention of a continuance.

By the act of the 2d February, 1839, "to abolish attorneys' fees in certain cases," it is enacted, that in suits brought for the purpose of collecting money, no judgment shall be rendered at the appearance term (unless it be by consent,) for the failure of the defendant to plead or enter an appearance as then required by law. And that the defendant shall plead to the merits within the first week of the appearance term, and upon failure to do so, shall forfeit his right to make any defence thereafter. The terms of this act are exceedingly clear and show that in a case like the one before us no judgment can be rendered against the defendant, unless it be by consent, until the second term after the service of process.

There is nothing in the record to show that the defendants consented that a judgment might be taken against them. The consent contemplated by the act is express, and not merely inferable from an omission to plead. This is indicated by the positive declaration that no judgment shall be rendered at the appearance term for the failure to interpose a defence.

We find in the record what is called a plea, but it is only the title of a plea, and could not be recognized unless accepted by

the plaintiff. But if it were entirely formal it could not influence our judgment in any degree. Our conclusion is, that the judgment of the Circuit Court must be reversed and the cause remanded.

STEPHENS, *et al.* v. WOMACK.

1. Upon a motion by the principal sheriff against his deputy, it is necessary that the record should show that the deputy had one days notice of the proceeding against the principal sheriff for the default of the deputy—that a judgment was obtained against him for such default and its amount—that he was in fact his deputy, and the others sought to be charged, his sureties.
2. It is not necessary that the liability of the principal sheriff to the plaintiff in execution be shewn, nor is any notice to the deputy and his sureties necessary of the intended motion of the principal sheriff against them.

Error to the County Court of Tuskaloosa.

THIS was a judgment obtained by default in the Court below, by the defendant in error as principal sheriff, against the plaintiff in error, as his deputy, to recover the amount of a judgment obtained against the sheriff for the misconduct of the deputy in not paying over money received by him on an execution in his hands.

The record recites that the plaintiff came by his attorney and moved the Court for judgment against Andrew J. Stephens, as late deputy, &c. and against Larkin D. Holleman, his surety, &c. for the sum of five hundred dollars, the amount of a judgment this day rendered against the said Jesse Womack, as sheriff aforesaid, for failing to pay over the amount of an execution, &c. which is particularly described. And it appearing to the satisfaction of the Court, that the said execution, before the day so appointed for the return thereof, came to the possession of the said Andrew J. Stephens as such deputy, in time to be executed, and upon which execution, the said Andrew J. Stephens received the amount of money therein specified to be made; and that he has failed to pay over the same

Stephens, *et als.* v. Womack,

to the said Jesse Womack, or to the plaintiff in the execution; and it also appearing to the satisfaction of the Court, that the said Andrew J. Stephens, was, at the time, he received said execution, and at the time he collected the money thereon, as aforesaid, a deputy of the said Jesse Womack, sheriff as aforesaid; and that at the same time, the said Holleman was his surety; and that the said Stephens and the said Holleman were notified of this motion, the time *required by law*, and the said Stephens and the said Holleman being solemnly called, came not, but made default. It is therefore considered, &c. The Court rendered judgment for the amount which had previously (as is stated) been recovered of the principal sheriff, by the plaintiff in execution.

From which judgment, this writ is prosecuted.

The plaintiff now assigns for error:

- 1st. That the notice is insufficient, in not describing the execution, its date, &c.
2. That the record does not shew that a judgment had been rendered against the sheriff, for the default of the deputy.
3. That the judgment is rendered for too much.
4. That the judgment does not shew when the execution was returnable.
5. That the record does not shew that the money was received before the return day of the execution.
6. No demand of the deputy is shewn.
7. It does not appear that the judgment against the principal sheriff was on account of the default of plaintiff in error as his deputy.

BLISS & REAVIS, for plaintiff in error, cited Aik. Dig. 174 § 75; 1 Stewart and Porter, 486; 1 Ala. Rep. 635; 2 Stewart and Porter, 109; 3 ib. 385.

PECK & CLARKE, and COCHRAN, contra.

ORMOND, J.—In the transcript of the record sent to this Court, a paper purporting to be a notice, is sent up by the clerk, but not being referred to in the judgment, it cannot be considered as a part of the record: see *Bates vs. The Planters' Bank*, 8 Porter, 99, and subsequent cases: the assignments of error, therefore, founded on the notice must be disregarded.

This is a proceeding by the principal sheriff, against his deputy, a judgment having previously been obtained by the plaintiff in execution against the former, for the default of the latter.

It is founded on a statute to be found in Aik. Dig. 389 § 11, "whenever judgment shall be rendered by any Court of this State, against any sheriff for any failure, neglect of duty, or misconduct in office, and it shall appear to the satisfaction of the Court, that such failure, neglect of duty, or misconduct in office; is the failure, neglect, or misconduct of his deputy, it shall be the duty of the Court, on motion of the sheriff, to render judgment against such deputy and securities in favor of the principal sheriff for the whole amount of the judgment and costs rendered by the Court against such principal sheriff, by reason of such failure neglect of duty, or misconduct of said deputy, for which execution may issue as in other cases: *Provided*, that the deputy or his security or securities shall have one days notice of the pendency of the proceedings against the principal sheriff."

To enable the Sheriff to recover of his deputy under this act, nothing more is necessary than to prove that the deputy, or his surety had one day's notice of the proceeding commenced against him for the default of the deputy—that a judgment was obtained against him for such default and its amount—that the person he seeks to charge was his deputy, and that a certain person was his surety. As this judgment is a mere consequence of the judgment previously rendered against the principal sheriff, the liability of the principal sheriff to the plaintiff in execution, for the default of the deputy, need not be shown; nor is it necessary that the record should show any notice to the deputy or his sureties, of the intended motion by the principal sheriff against his deputy and sureties. It is sufficient, if either the deputy or his sureties have one day's notice of the motion against the principal sheriff, and if such notice is given, immediately on the rendition of judgment against the principal sheriff, a judgment may be rendered in his favor against the deputy and his sureties, who caused the default.

Although this record contains a great deal of superfluous matter, it does not show those facts on which alone the liability of the plaintiffs in error were to accrue.

It does not appear from the record that the plaintiffs in error

had notice of the pending motion against the principal sheriff—nor does it appear that a judgment was rendered against the principal sheriff for the default of the deputy or its amount.—Some of these facts are indistinctly stated in the recital of the motion made against the plaintiffs in error, but it does not appear from the record, that the facts necessary to create the liability to this summary proceeding were proved; and from the earliest period of the history of this court down to the present day, it has been held that the judgment, whether by default or otherwise, must shew affirmatively every fact necessary to give the Court the summary jurisdiction. Where as, in this case, the judgment is by default: those facts which constitute the defendant's liability, must be also shewn. If the judgment be rendered on a verdict founded on an issue between the parties, the facts necessary to constitute the liability of the defendant for the debt, will be presumed to have been in proof before the jury, as in other cases, where suit is brought in the ordinary mode.—8 Porter, 372.

For the reasons given, the judgment must be reversed, and the cause remanded.

PALMER V. LESNE.

1. Where a declaration is filed against two, and leave is given to the plaintiff, to amend by striking out the name of one, the amendment need not be made in fact; the granting of leave will operate to complete it.
2. An insufficient writ, or one which is variant from the declaration, can't be reached by a demurrer, or on error.
3. *Semble*; to authorise the Court to adjudge that the discontinuance of a suit as to one of several joint defendants, where the case does not come within the act of 1818, is a discontinuance of the action, it is not enough that the objection to the discontinuance is shown by the writ alone.
4. A Court may, in the exercise of its discretion, award a new trial, but it cannot order a non-suit, or discontinuance, upon the ground that the declaration is variant from the writ, where the variance is not regularly brought to its view by the pleading.

THE plaintiff in error declared against the defendant and

Frederick Ravesies, in the County Court of Mobile, upon their joint promises to pay him money, due for the hire of his servants; and also, for work and labor done for them by his servants, at their joint request. It appears from the record, that the writ was executed on Lesne only, and returned, "not found," as to Ravesies.

It does not appear that either of the parties declared against, pleaded; but at the trial term, an entry was made as follows: "This day came the parties by their attornies, and this cause is discontinued by plaintiff as to Frederick Ravesies, and the plaintiff's attorney having leave to amend his declaration by striking out the name of F. Ravisies, so as to declare upon the several promises and undertakings of said Lesne; and thereupon came a jury of good and lawful men, to wit: Mark A. Ward and others, who upon their oaths do say, "We, of the jury, find for the plaintiff, and assess the damages at three hundred and sixteen dollars and 24 cents. It is, therefore, considered by the Court, that the plaintiff recover from the defendant, James Lesne, the sum of three hundred and sixteen dollars and twenty-four cents, for his damages by the jury, in forma aforesaid assessed; also, his costs by him about his suit, in this behalf expended." Afterwards, on a day of the same term, the Court made an order in these words: "On motion of defendant's counsel, it is ordered, that the verdict in this case be set aside, and a non-suit be entered against plaintiff. It is, therefore, considered that plaintiff pay costs, for which execution may issue."

To revise the order setting aside the verdict, and directing a non-suit, and the payment of costs, the plaintiff has prosecuted his writ of error to this Court.

LESSESNE, for the plaintiff.

STEWART, for the defendant.

COLLIER, C. J.—The leave granted by the County Court to the plaintiff, to amend his declaration, was special, and pointed out the particulars in which the amendment was to be made. It did not require a new declaration to be filed, but merely that the name of Ravesies should be stricken out of the one on file, so that it allege the promises and undertakings, the non-per-

formance of which are complained of, as those of Lesne individually. Such an order to amend, is unlike a permission to amend generally, by filing a new declaration, or adding a distinct count; while the latter would require the amendment to be made in point of fact, the former considers the leave granted as operating in itself to complete it.

We must then, consider the plaintiff as declaring upon promises made severally with the defendant, instead of charging a joint liability by Ravesies and Lesne. In this view of the case, the declaration is good, in showing a cause of action against the defendant alone, and must have been so adjudged on demurrer. It has been repeatedly held, that an insufficient writ, or one which is variant from the declaration, cannot be reached by demurrer, or on error; and this Court, in reviewing the action of the County Court, cannot look into the record farther than that Court should have done.

The defendant, however, could not have been prejudiced by the permission given to the plaintiff to amend; the amendment being considered as made, the declaration ceased to conform to the writ, and he should have pleaded the variance in abatement. This, according to the decisions of this Court from an early day, is the only manner in which the point could have been presented.

In all the cases in which it has been decided, that a discontinuance of a suit as to one of several joint defendants, where the case does not come within the act of 1818, is a discontinuance of the action, the objection was shown by the declaration. *Kennedy v. Russell & Patton*, Minor's Rep. 77; *Thompson v. Saffold, et al.* 2 Stew't Rep. 494; *Tindall v. Collins*, 2 Porter's Rep. 17. But in the present case, the leave to amend, perfected the declaration, and the writ alone showed that the plaintiff could not proceed.

It was within discretion of the County Court to set aside the verdict, and award a new trial, but beyond the just exercise of its powers to order a non-suit or discontinuance; because, as we have seen, the variance between the writ and declaration was not regularly presented. The consequence is, the judgment complained of, is erroneous, and must be reversed, and the cause remanded.

MURRY V. HARPER.

1. A justice of the peace may permit an amendment to the complaint in a case of forcible entry and detainer, before issue joined.
2. When the Circuit Court affirms the judgment of a justice of the peace, in a case of forcible entry and detainer, it is not error for the Court to remand the case, to enable the justice to issue a writ of restitution.

Error to the Circuit Court of Tallapoosa.

THIS action was commenced by the defendant in error, against the plaintiff in error, before a justice of the peace, for a forcible entry and detainer.

From a bill of exceptions taken at the trial before the magistrate, it appears that a mistake was made in the complaint, in describing the land by the township and range in which it was situated, the one being put for the other. On motion of the complainant, he was permitted by the justice to amend his complaint, so as to describe the land truly, though objected to by the plaintiff in error. The jury having found a verdict in favor of the defendant in error, the cause was carried, by *certiorari*, to the Circuit Court of Tallapoosa county, where the judgment was affirmed, and a *procedendo* directed to be issued to the justice of the peace. From the judgment of the Circuit Court, this writ of error is prosecuted.

The assignments of error relied on in this Court, are,

1. The permission given the defendant in error to amend his complaint.
2. That the Circuit Court, instead of awarding a *procedendo* to the justice, should have directed a writ of *habere facias possessionem* to issue.

T. CLAY, for plaintiff in error.

HEYDENFELDT, contra.

ORMOND, J.—It is supposed by the counsel for the plaintiff in error, that the record shows that the amendment which the justice of the peace permitted, was made after issue joined; but

he insists, that if he is wrong in this supposition, the justice had no power to permit an amendment at any stage of the proceedings.

The record is certainly not so clear as could be desired, as to the time when the amendment was made. The doubt is created by the statement in the record, that it was "on the trial of the cause." This is, however, we think, satisfactorily explained by the record itself, and especially by the objection made before the justice, which was not that it would change the issue which the parties had made up, but that it would make the complaint vary from the notice which had been given by the justice to the defendant below. It is our practice, and that of all appellate Courts, to make all reasonable intendments in favor of the judgments of subordinate tribunals. It is not sufficient that error may have intervened; it must be distinctly pointed out on the record.

Every Court, whether of general or limited jurisdiction, has the power to permit such amendments to be made in the pleadings, while the cause is in *feri*, as will enable it to fulfil the end of its creation, the administration of justice. If by the amendment, the cause is presented in a new aspect, so that the opposite party would be surprised thereby, if forced into a trial, the amendment will not be made, but on the condition of the necessary time being given.

We can perceive no error in the judgment rendered by the Circuit Court. The statute requires the justice of the peace to issue a writ of *restitution*, when the jury find for the complainant, and that this might be done, it was proper to remand the cause to the justice who rendered the judgment.

The act "to regulate judicial proceedings," passed 19th January, 1839, does not affect this question.

We can perceive no error in the judgment of the Circuit Court, and it is therefore affirmed.

BRIDGES & BEERS v. MILLER.

1. Where a motion was made for a new trial at the term at which the judgment was rendered, but the Court adjourned without disposing of it, the refusal of the Judge at the next term, to hear the motion and decide it on its merits, will not authorise a reversal of the judgment in the cause. A *mandamus* is the appropriate remedy to compel a Court to entertain and decide upon a matter within its discretion.

IT appears from the record in this cause, that the defendant in error recovered against the plaintiff at the fall term, 1840, of the Circuit Court of Mobile, a judgment for the sum of sixteen hundred and thirty-seven dollars; and at the spring term, 1841, the plaintiffs moved for a new trial, which being refused, they excepted. The bill of exceptions is as follows: "In this cause, a verdict was rendered for the plaintiff at the last term of the Circuit Court for Mobile county, and a motion was made at the said term for a new trial. Before a decision was made on the motion, and while it was still pending, the Court aforesaid, adjourned to the next regular term of the said Court; a judgment having been entered on said verdict. At the present term, the same motion was made for a new trial upon the same verdict, before the Hon. E. S. Dargan, the presiding Judge, who declined to hear the same, or inquire into the merits thereof, because the said motion should have been determined at the last term of the Court, and that it could not now be decided. To which refusal to hear the aforesaid motion, the said defendants except, and pray the Court to sign this bill of exceptions."

The only error assigned is, that the Court erred in not hearing the motion for a new trial.

CAMPBELL, for the plaintiffs in error.

STEWART, for the defendant.

COLLIER, C. J.—It does not explicitly appear from the bill of exceptions, that a motion for a new trial was regularly made, and continued at the term of the Court at which the jury

rendered their verdict in this cause ; but conceding such to have been the fact, and we are satisfied, that the refusal of the Judge to entertain the motion at the succeeding term, is not available on error. The granting, or refusing a new trial, is a matter within the discretion of the Court, trying the cause ; and however decided, cannot be revised on appeal or writ of error.—Nor can the refusal to decide upon such a motion, be thus made the ground of objection to a judgment in other respects, regular; for as the appellate Court cannot examine into its merits and determine whether it should have been granted, it cannot undertake to say, that the party complaining, has been prejudiced by refusing to decide upon his application for a new trial. And unless error is affirmatively shown to the probable injury of the plaintiff, the judgment will not be reversed.

But the refusal of a Court to decide upon a matter even within its discretion, is not a case unprovided for by law. In such a case, a *mandamus* is the appropriate remedy to compel the Judge to make such a decision, as in his judgment is proper and legal. *Dunkin v. Mun*, T. Raym. Rep. 235; *Rex v. Hay*, 4 Burr. Rep. 2295; *Commonwealth ex rel. Breckenridge v. The Judges of the Court of Common Pleas. of Cumberland co.*, 6 Wheeler's Ab. 556 ; 1 Serg't & Rawle's Rep. 187.

We have only to add, the judgment is affirmed.

HARDEMAN, et als. v. SIMS, et als.*

1. Courts of Chancery have jurisdiction where a bill is filed to recover a slave in specie, under peculiar circumstances ; as where the slave is a family negro, and a strong attachment exists towards the slave, so that damages would not be an adequate compensation, but an allegation that the negro is a "family slave," and that the complainants felt that personal regard for her which is usually felt for property of this kind," is not sufficient to oust the common law Court of jurisdiction, and confer it on a Court of Chancery.
2. All the plaintiffs to an action, must be competent to sue, otherwise the action

* NOTE.—This opinion was delivered at the January term, 1840, and was accidentally omitted in the published opinions of that term.

cannot be maintained; when, therefore, the statute of limitations has begun to run against one of several parties intitled to a joint action, it operates as a bar to such action.

Error to the Chancery Court of Columbiana.

THIS was a bill in Chancery, filed by the plaintiffs in error; against the defendants in error.

The bill charges that the grand-father of the complainants, one Turner Christian, on the 14th September, 1822, by deed duly recorded in the clerk's office of Charles City county, Virginia, conveyed to them certain negro slaves, which were then in the possession of their father, and which he shortly after brought with him to this State. That they were then, and, with the exception of one of the complainants, still are, infants; that their father being a man of extravagant and intemperate habits, sold many of the negroes, and contracted debts on which judgments being obtained, one of the negroes was sold and purchased by the defendant Sims. The slave so purchased was a girl, now about fifteen years of age, is "a family negro, and resided with them in their father's family, and that they have all that personal regard for her that is felt and entertained for property of this kind by all families, and therefore, seek her recovery in specie." The bill also charges that the complainants apprehend that the negro will be carried beyond the limits of the State, and prays a *ne exeat*, which was granted.

Sims, in his answer, denies all knowledge of the facts charged in the bill, except that he purchased the negro at public sale: she was then about six years old, and that he gave a full price for her. He denies all knowledge of the claim of the plaintiffs to the negro, and relies on the statute of limitations.

A great deal of testimony was taken in the cause, which from the view the Court take of the case, is not necessary to be set out. The Chancellor dismissed the bill under the defence of the statute of limitations, from which decree this writ of error is prosecuted.

BAYLOR, for plaintiffs in error.
PECK, contra.

ORMOND, J.—The first question to be considered is, whether such a case is made by the bill, as will give the Court of

Chancery jurisdiction. The object of the bill is, to recover a slave alleged to be a *family negro*.

It is certainly true, that slaves, although by our law considered property, differ in many respects from other chattels, and many cases may be supposed in which it is not proper that they should be considered as mere chattels. They are intellectual, moral beings, and attachments of the strongest kind, sometimes grow up between master and slave, having its origin not unfrequently in early infancy, and strengthened in after life by dutiful service and obedience, on the one hand, and care and protection on the other. When such a state of things exists, it is the duty of a Court of Chancery, to lend its aid in recovering the slave in specie, if improperly withheld, as damages would frequently be no compensation. So, also, the relation of husband, wife or child, might subsist between slaves, the property of the injured party, and the one sought to be recovered, where the reason for sustaining the jurisdiction of chancery would rest on the same foundation, and other cases might be supposed.

We do not, however, assent to the position, that the defendant in detinue may, after judgment, retain the property by paying the alternative value, assessed as damages, as it is certainly in the power of the Court to compel its production, if in the possession of the defendants. As, however, the action of a Court of Law is not so prompt, decisive, or certain in such matters, as that of a Court of Chancery, humanity requires that the jurisdiction should be upheld, when a proper case is presented. This is the doctrine of the Courts of Virginia, as stated in the cases of *Wilson and Trent v. Butler*, 3 Munford, 559, and *Allen v. Freeland*, 3 Randolph, 170.

But the allegations of this bill do not make out a case which will warrant the interposition of a Court of Chancery.—The slave, to recover which the bill is filed, is described “as a *family negro*, the gift of the complainants grand-father, and had resided with them in their father’s family; that they felt for her all that personal regard that is commonly felt and entertained for this kind of property.” The single fact relied on here is, that the girl is a *family negro*; for as she was sold at the age of six years, some eight or nine years before the filing of the bill, it is impossible to suppose that any strong attach-

ment had subsisted between the complainants and the subject of the suit; nor is any particular attachment alleged, further than is commonly felt towards family negroes. On the other hand, the defendant purchased her at six years of age, has been in possession of her ever since, and must be presumed, as he insists in his answer, to be more attached to her, than those who had only known her in early infancy, and have been separated from her for many years.

This question came before this Court in the case of *Baker v. Rowan*, 2 Stewart & Porter, 371, where the Court hold this language: "We freely confess that slave property is in general, distinguishable from other chattels in this respect; that family slaves, to which owners become attached, should be preserved in specie, by the interposition of chancery, rather than leave the party to seek reparation in damages by suit at law; even with the partial assurance of restoration afforded by the action of detinue. The same principle applies equally, when from other circumstances a peculiar value or interest attaches to slaves or other property, but it must be such as to distinguish the article from other chattels of the like nature.

"If the case under consideration, depended alone on this principle, I should consider the allegations of the bill insufficient to warrant the interposition of chancery. It describes the property in general terms, as *family slaves*, for which reason the complainant desired to retain them; but the circumstances which could create peculiar value or attachment, are not stated with sufficient precision; nor is even the existence of particular attachment alleged."

The language here employed, is peculiarly appropriate to this case, to which it bears a striking analogy. To allow the general allegations employed in this bill, "that the slaves are family negroes," to be sufficient to oust a Court of law of its jurisdiction, would be to transfer to equity the decision of all controversies relating to family slaves. Whilst, therefore, we would sustain the jurisdiction of the Court of Chancery, in cases of this character, in aid of the humane desires of an owner, who for peculiar and sufficient reasons, sought the recovery of a slave in specie, we cannot permit it to be carried so far as to prostrate the cheaper and more convenient remedy afforded by the Courts of common law.

We are also of opinion, that the defence of the statute of limitations is available to the defendants. It was contended in argument, that the exception in the statute in favor of infants, would take this case out of the statute, notwithstanding one of the complainants was barred by the statute.

We understand it to be the settled rule, that when a joint right of action accrues to several, the right must exist in all at the time of the action brought. When the statute begins to run as to one of several parties to a joint action, it runs as to all. This was explicitly held by the Court of King's Bench, in the case of Perry and others v. Jackson and others, 4th Term Rep. 516, where it was held that the exception in favor of persons beyond sea, could not be claimed by one partner abroad, the other being in England, and affected by the statute. And in Marsteller and others v. McClean, 7 Cranch, 156, a replication to a plea of the statute of limitations, alleging that some of the plaintiffs were infants, and within the exception of the statute, was bad on demurrer.

The precise point here raised, was also determined by the Court of Appeals of Kentucky, in the cases of Milner v. Davis, 1 Littell's Select Cases, 436; and Allen v. Beal's heirs, 3 Marshall, 554. That these decisions contain a sound exposition of the law on this subject, we entertain no doubt, and it would not be difficult to show that a contrary doctrine would not only involve great absurdities, but would also go far to deprive the statute of limitations of its beneficial effects.

The statute destroying the right of survivorship in cases of joint tenancy, has no influence on this case. The question here is not as to the sufficiency of the title of the complainants to the slaves supposed to be given to them by their grand-father, but it is whether they have a right to *maintain an action* for their recovery. The decision of this question does not depend on the fact of title, but conceding the title to be as alleged, the question is, whether the bar created by the statute, does not forbid the assertion of such right.

We have not considered it necessary to examine the other questions argued at the bar, as either of the two points discussed, is decisive of the case.

The decree of the Chancellor dismissing the bill, is therefore affirmed.

CHILDRESS V. CHILDRESS.

1. Where an executor purchases part of the testator's estate, he is, after the expiration of the term of credit, chargeable with the amount as cash.
2. A testator bequeathed to his wife "one thousand dollars in cash to be paid her out of the money due me (him) in the State of Virginia, from Thomas McCargo, when the same shall be collected." He also bequeathed the balance of the debt, after his wife should be paid, to his son: *Held*, that the wife was entitled to her legacy, if so much was collected of the debt, without abatement for the charges of collection; the residue of the debt being more than ample for that purpose.
3. A bequest of the balance of the debt or money due the testator from an individual named by him, after the payment of a legacy with which he had charged it, means so much as shall be realized over and above the charge, after the costs of collection shall have been paid; for these costs the estate generally, shall not be bound; it appearing from the will that the testator had specifically devised and bequeathed his property.
4. Although the second section of the act of 1830, to extend the powers of the Orphans' Court, &c. does not expressly mention legatees, yet they are entitled to the remedy it affords, and may have execution of decrees of the Orphans' Court in their favor.
5. It is no objection to a decree in favor of a legatee, that she is a co-executrix of the will—the proceeding is at her instance in the former character only.

Writ of error to the Orphans' Court of Tuskaloosa county.

It appears from the record, that the parties were both legatees under, and executors of the will of James Childress, deceased. Among other bequests by the testator, in favor of the defendant in error, is one of "one thousand dollars in cash, to be paid to her out of the money due me (him) in the State of Virginia, from Thomas McCargo, when the same shall be collected." He also bequeathed to the plaintiff "the balance of the debt, or money due me (him) in the State of Virginia, from Thomas McCargo, after my (his) wife shall receive the amount of the said debt to her above bequeathed."

Upon a final settlement of the accounts of the executors with the Orphans' Court, the plaintiff exhibited an account for about eight hundred dollars, being his expenses and commissions for collecting the debt due from McCargo, which was, including principal and interest, about fifty-nine hundred dollars. The Court refused to allow the account of the plaintiff, and rendered

a decree against him in favor of the defendant as a legatee under the will, for the sum of one thousand dollars bequeathed.

The plaintiff in his account, as executor, admits that he collected the McCargo debt, and charges himself with one thousand dollars, as due to the defendant for her legacy. He also charges himself with "his note for Arcola lots, \$265 00."

B. F. PORTER, for the plaintiff in error, insisted that the Orphans' Court erred,

1. In charging the plaintiff with his note for Arcola lots, and rendering a decree against him for the amount of the same.

2. In rejecting the plaintiff's account for collecting McCargo's note, and thus charging his portion of the same with the expence of the collection.

3. In rendering a decree in favor of the defendant for one thousand dollars, the amount of the monied legacy bequeathed her by the testator.

PECK & CLARK, for the defendant: The writ of error in this case, does not authorise this Court to look into any objection to the decree of the Orphans' Court, except such as relates to the defendant, as legatee.

The decree, so far as it respects the plaintiff's note for Arcola lots, cannot as the case is presented, be drawn in question.

The testator, it is obvious, from the terms of his will, intended that the McCargo debt, if collectable, should bear the expence of its collection, and that the nett balance should be paid to the plaintiff, after the defendant had received her portion of it. As the money remaining in the hands of the plaintiff subject to the payment of the legacies, &c. was more than equal to the decree in favor of the defendant; the Orphans' Court did not err in thus directing its payment.

COLLIER, C. J.—In respect to the plaintiff's note for Arcola lots, it is by no means certain, that in the present case, any question can be raised upon it. But be this as it may, we think the Orphans' Court very properly charged the amount of that note against the plaintiff, as cash. If an executor purchases a part of his testator's estate, he is, after the expiration of the term of credit, chargeable with the amount as cash, in the same manner as if he had collected money or converted property

belonging to it. True, it is the duty of an executor, to collect the debts due the estate he represents; but there is no process by which he can coerce a collection of himself, and as he is the party who is both to pay and receive the money, the law will regard him as in possession of it from the time it became due. The case of *Douthitt's administrator v. Douthitt*, 1 Ala. Rep. N. S. 594, is unlike the present. There, the administrator was not charged with his own note, but the notes of the debtors of the estate, remaining in his hands as money. This Court reversed the decree, holding that the notes should not have been considered as cash.

The terms in which the debt due from McCargo, to the testator, are bequeathed, we think sufficiently indicate that it must bear the expense of its collection. It is the balance of the debt, or money, after deducting the defendants legacy that is given to the plaintiff, not a specific sum, or an amount equal to the balance of the note. And this conclusion becomes irresistible from an examination of the entire will. The testator makes a disposition of his property to his wife and children, assigning to each, a portion, with great particularity; and as no disposition is made of any residuum, the fair inference is, that he had specifically devised and bequeathed his entire estate. If then the testator disposed of all his property specifically, an abatement of legacies would be necessary, if the expense of collecting the McCargo debt was chargeable upon the estate. Such an idea cannot be favored; the reasonable intendment is, that the testator designed that each legatee should have what he gave them, and that the plaintiff should have whatever might be collected, or realized upon the note of McCargo, after deducting the specific legacy to the defendant. Such sum as might be retained by attorneys for professional services or be paid for Court costs, would not come into the hands of the executors; or if it did, it would come subject to the charge, and could not of course become liable to pay the bequest to the legatee. By the terms, "balance of the debt or money," we must then understand to have been meant, all that the note was worth to the estate, after deducting from it, the charge of one thousand dollars. That the testator never intended to give a specific sum to the plaintiff, is further shewn, by the fact,

that the note was daily enlarging its amount by the accumulation of interest.

The account of the plaintiff for the collection of the note being disallowed, there remained in his hands, more than one thousand dollars, subject to the payment of the sum bequeathed to the defendant; and as her legacy was specific, and could not be abated, the last objection to the decree cannot be sustained.

The first section of the act of 1830, "to extend the powers of the County and Orphans' Court in certain cases and for other purposes" enacts, that "all decrees made by the Orphans' Court on final settlements on the accounts of executors, administrators, and guardians, shall have the force and effect of judgments at law, and executions may issue thereon for the collection of the several distributive amounts against such executor, administrator, or guardian." The second section provides, that when distribution of real or personal estate is decreed, each distributee, heir or devisee, may have an execution or attachment, one or both, &c. against the executor, administrator or guardian.

A statute amendatory of the act of 1830, was passed in 1832, which enacts, that "the County Courts on final settlements of executors, administrators and guardians, shall assess and insert in their decree, the amount of their distributive share." And further, "whenever any execution shall have issued on any decree made by the Orphans' Court, on final settlement of the accounts of executors, administrators or guardians, and is returned by the sheriff "no property found" generally, or as to a part thereof, execution may forthwith issue against the securities of such executor, administrator or guardian. Although legatees are not specially designated in the second section of the act of 1830, yet the provisions of that statute clearly indicate that they are entitled to the benefit of the remedy it affords. A different construction would make it to a great extent inoperative as it respects executors. But it is unnecessary to reason this point as we have heretofore taken the view of the act which is now intimated to be correct.

The fact that the defendant is a co-executor, is no ground of objection to a decree in her favor against the plaintiff, who has assets in hand to satisfy it. In this proceeding, her charac-

ter of executrix, is lost sight of, and she is regarded only as a legatee. True, if she has entered into a bond jointly with the plaintiff, to execute the testator's will, upon the return of "no property found" to an execution against the plaintiff, she cannot under the act of 1832, sue an execution against the sureties in the bond. But the right to an execution, cannot at all affect the regularity of the decree.

In the proceedings of the Orphans' Court, there is then no error, and its decree is consequently affirmed.

WOOD v. WOOD, *et al.*

1. The father, as the guardian by nature, is entitled to the direction and control of the person and property of his child until it attains the age of twenty-one years, subject to the right of chancery under some circumstances to place the child under the pupilage of another.
2. Where the remedy at law and in equity, is concurrent, the statute of limitations applies alike in both forums. In the case of a *strict trust*, and where a fraud has been practised, the statute will not operate *proprio vigore*; unless perhaps the trustee in the first case has placed himself in a position antagonistical to the *cestui que trust*, or in the latter until the fraud has been discovered.
3. The act of 1806, "concerning wills and testaments," &c. gives an action at law to a legatee against an executor, the limitation to the prosecution of which is six years; and after the expiration of that period a suit in equity, cannot be brought for the recovery of a residuary legacy, &c.
4. A court of chancery will not entertain a bill where the amount in controversy is so inconsiderable as seventeen dollars and fifty cents.
5. The executor purchased from the United States, paid for and received the evidence of title for a tract of land; afterwards he sold to the testator a moiety, who paid the money, but received no written evidence of his purchase; the testator in his lifetime, relinquished his right to the executor for a valuable consideration without writing: *Held*, that the executor was not bound to account for the land as a part of the testator's estate.
6. An admission made for the purpose of effecting an amicable settlement of a matter in dispute, is inadmissible against the party making it.
7. *Semble*—executors as to whom a bill in chancery is dismissed, are competent witnesses for a co-executor, as against whom the bill is prosecuted, where it appears independently of their testimony, that they are not responsible to the complainant or their co-executors.

Writ of error to the Court of Chancery sitting at Columbi-
ana.

ON the 21st of February, 1838, the plaintiff in error, filed his bill against Joseph Wood, his father, and Ransom and Person Davis, executors of the last will and testament of William Davis, deceased, setting forth, that on the 15th day of September, 1821, William Davis, who was the maternal grand-father of the complainant, devised and bequeathed to the children of Sally Wood, the complainant's mother, certain negro slaves, particularly named, and one sixth part of the testator's estate, not specially disposed of by that will: That the testator's wife and the complainant's mother, were then dead; and the testator dying shortly thereafter, the executors in the month of October following, took upon themselves the execution of his will.

It is alleged that personal property of the testator, amounting in value to four or five thousand dollars, came to the hands of the executors, and was sold by them; in addition to which, he left valuable real estate, which Person Davis appropriated to his own use for the sum of six hundred dollars, not more than an eighth or tenth of its value. That the executors had paid to Joseph Wood, between five and six hundred dollars for the complainant, his brothers and sisters, which money Joseph Wood had invested in the purchase of a negro woman and children.

The complainant states the names and ages of the children of Sally Wood, from which it appears that they are six in number, as also the legatees, &c. of William Davis deceased, who are the same number. *Further*, that in consequence of the minority of his children, Joseph Wood, received from the executors a part of their general residuary legacy, and all the slaves specifically bequeathed to them, and has ever since employed them for his own use and benefit.

The bill, after stating all these several matters, (with others that need not be noticed) with much particularity, prays an account against the executors and Joseph Wood, for what may be due to the heirs of Sally Wood, under the will of their grand father, &c.

Joseph Wood, in his answer denies that he ever received or pretended to hold under the will of William Davis, the negroes specifically bequeathed, and affirms that these slaves were not the property of the testator at the time of his death, having been given by him to the defendant many years previously. He

admits that he received from the executors a negro man named Bob, in 1822, who was worth but little, but would have sold for five hundred dollars; this slave he exchanged for another, named in his answer, and paid as the difference in value, the sum of fifty dollars.

The defendant also admits, that he received from the executors, five hundred and fifty-six dollars, in cash; but denies that he invested the same, or any part of it, in a negro woman. Admits that the executors paid him sixteen dollars, being one-sixth of the cash on hand; and that Person Davis paid him one hundred dollars for a claim set up by this defendant to one-sixth of a tract of land, then supposed to have been the property of the testator, at his death, but which he insists, was the individual property of Person Davis.

Defendant avers that he has always been willing to settle with the complainant, his brothers and sisters; has made repeated efforts to do so, but so far as the complainant is concerned, all attempts at a settlement have proved unavailing.

Ransom and Person Davis confirm by their answers, the facts stated by Joseph Wood—deny that they have in their hands any more of the estate of their testator than belongs to them; and insist that they have made a full and fair settlement of their executorship.

Person Davis, insists upon the statute of limitations in bar of the complainant's bill. All the defendants state in their answers the value of the hire of the slaves in the possession of Joseph Wood, which the complainant insists are subject to distribution; and they all concur in stating the reason why the testator mentioned in his will the slaves he had previously given, to have been to manifest to his children, that his bounty was bestowed equally on all.

Accompanying the answer of Person Davis as an exhibit, is a transcript from the record of the Orphans' Court of Dallas county, of the probate of the will of William Davis, deceased, an account of the appraisement and sale of the personal property of the testator, together the account current of the executors, which appears to have been exhibited for allowance and final settlement on the 5th of April, 1824. The usual order of publication appears to have been made, but no further action was had by the Court upon the account. At the foot of the ac-

count, the executors state a balance against themselves of two hundred and eighty-nine dollars and forty-three 3-4th cents.

The testimony of several witnesses are sent up with the record, but the substance of the evidence so far as pertinent to the points here made, will sufficiently appear from the opinion of the Court, so as to render its recital unnecessary.

The bill, answers and proofs, were referred to the master to inquire into, and report upon the several matters of account put in issue by the pleadings. Upon the coming in of the report, exceptions were thereto filed, and after argument before the Chancellor, it was adjudged, that as to the executors of William Davis, the statute of limitations operated as a bar to the complainants suit against them; and thus far the bill was dismissed, the report set aside, and the cause again referred as to the claim against Joseph Wood. The master, in his second report, states the complainant is entitled to recover of his father, the sum of five hundred and ninety-two dollars and fifty-eight cents, that being the aggregate of one-sixth of the value of the slave and his hire, and the like proportion of the monies received by the father for his children, with interest thereon, excepting the sixteen dollars, one-sixth of the cash in testator's hands at the time of his death; in respect to which the the account is entirely silent. The report also proceeded to state the value and names of the slaves specifically bequeathed, as also the yearly sums at which they would have hired from the time of the testator's death, and referred it to the Chancellor to determine whether these slaves passed by the will.

The Chancellor determined that the slaves bequeathed to the children of Sally Wood, did not pass by the will, the testator having previously given them to Joseph Wood; but as to the several other sums reported to be due to the complainant, the report was confirmed and a decree rendered in his favor, in which it was adjudged that each party pay his own costs.

It is now assigned for error, that the Chancellor erred,

1. In dismissing the plaintiff's bill as to the defendants, Ransom and Person Davis.
2. In decreeing that certain slaves named in the second report of the master, were the property of the defendant, Jo-

seph Wood, and that the plaintiff had no interest in them under the will of his grand father.

PECK, for the plaintiff in error, insisted,

1. Length of time did not bar the plaintiff's suit, as against the executors of Wm. Davis. The case does not come within the principle of *Maury's adm'r v. Mason's adm'r*, 8 Porter, 211: See, also, *Decouche v. Savatier*, 3 Johns. Ch. Rep. 216-7; *Arden v. Arden*, 1 *ibid.* 313; *Gist, et al. v. The Heirs and Reps. of Cattell*, 2 Dess. Rep. 53.

2. The evidence, it is conceived, does not show that the testator had previously given to Joseph Wood, the negroes specifically bequeathed to his children; and the testimony of the executors, though taken after the dismissal of the bill, as to them, is inadmissible in favor of their co-defendant; for their evidence is exculpatory of themselves.—*Gresley's Eq. Ev.* 259; *Croft v. Pyke*, 3 P. Wms. 180; *Bellow v. Russell*, 1 B. & B. 96; *Mulvany v. Wilkes*, *ibid.* 413.

CHILTON, for the defendants.

1. The statute of limitations operates a bar to the plaintiff's suit against the executors. In *Maury's adm'r v. Mason's adm'r*, 8 Porter, 222, it was decided, that where the remedy is concurrent at law and in equity, the statute will be applied alike in each Court. This principle here applies, for the statute gave to the complainant an action of account, which he could have prosecuted, had he so elected.

The statute need not be insisted on, in the pleadings, if it appear from the bill to have completed a bar.—*Sims v. Canfield, ex'r, &c.* 2 Ala. Rep. 555.

The answers of the executors affirm, that they have fully settled their accounts, and distributed the assets, and that the complainant, through his father, has received his full share.—*Hall v. Lay*, 2 Ala. Rep. 529, shows that the father, as the natural guardian, is authorised to receive a legacy, or distributive share of his infant son.

The amount due to the complainant from the estate of his grand-father, (even supposing that the executors retain in their hands the balance, according to the account they presented to the Orphan's Court for settlement) is so small, that a bill would not be entertained for its recovery.

2. In respect to the negroes specifically bequeathed, the evidence shows that they were not the testators at his death, but had been given by him to Joseph Wood, years previously.—The admissions made by the father for the purpose of effecting an amicable settlement with the complainant, his brothers and sisters cannot in any point of view prejudice his rights.—Minor's Rep. 225; 5 Paige's Rep. 104; 4 Wend. Rep. 292.

The common law rule, which perhaps might exclude the executors as witnesses, is no longer in force; the reason of it, has ceased since the statute of distributions in England; and such is also the result of legislation in this country.—Johnson v. Rankin, 3 Bibb's Rep. 87; Respass v. Morton, Hardin's Rep. 226; Pillow v. Shannon, 3 Yerger's Rep. 508; Studwell v. Patmer, 5 Paige's Rep. 166. But the question of their competency is not raised by the assignments of error, and cannot avail if it were; inasmuch as the objection was not made in the Court of Chancery.

COLLIER, C. J.—1. In Hall v. Lay, 2 Ala. Rep. 529, it was decided, that the Orphan's Court does not possess the power under the legislation of this State to appoint a guardian of the person or estate of a minor, whose father is living. But the father himself, as the guardian by nature, is entitled to the direction and control of the person and property of his child, until it attains its majority; subject, however, to the right of chancery, under some circumstances, to place the child under pupilage of another, and to provide for the security of the estate. Such being the law, it was entirely competent for the executors of Wm. Davis to place in the hands of Joseph Wood, that portion of the testator's estate, which was bequeathed to his children. In fact, the frame of the bill in the case before us, very clearly indicates that such a disposition of the plaintiff's legacy, is not complained of; but it is insisted that the executors have not fully accounted with the natural guardian; and hence an account is sought against the executors and the father, and a decree prayed for the amount of their respective liabilities. We will then consider the executors discharged to the extent to which they have accounted with Joseph Wood, and inquire whether the plaintiff is entitled to recover of them any thing further.

In cases where the remedy at law and in equity, is concur-

rent, the statute of limitations applies alike in both forums; it being considered as addressed to, and obligatory upon them.—In the case of a *strict* trust, and where a fraud has been practised, the statute will not operate *proprio vigore* in the first case, unless perhaps the trustee has placed himself in an antagonistical position to the *cestui que use*, or in the latter, until the fraud has been discovered.—Maur'y's adm'r v. Mason's adm'r, 8 Porter's Rep. 211; 2 Story's Eq. 735; Hovenden v. Lord Annesley, 2 Sch. & Lef. Rep. 607; Smith v. Clay, 3 Bro. Ch. Rep. 640; Bond v. Hopkins, 1 Sch. & Lef. Rep. 430; Kane v. Bloodgood, 7 Johns. Ch. Rep. 90; Mendlicot v. O'Donel, 1 B. & B. Rep. 166; Hawley v. Cramer, 4 Cow. Rep. 718; Farnam, adm'r v. Brooks, 9 Pick. Rep. 212; Codman v. Rogers, 10 Ibid. 119. But Courts of Equity recognize mere lapse of time, and the staleness of the demand, as a valid defence in cases where no statute of limitations directly governs the case. "In such cases," says Mr. Justice Story, "Courts of Equity act sometimes by analogy to the law; and sometimes act upon their own inherent doctrine of discouraging for the peace of society, antiquated demands, by refusing to interfere, where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."—2 Story's Eq. 736, and cases cited in note.

The 42 sec. of the act of 1806, "concerning wills and testaments," &c. gives the action of account to one joint administrator against another; and enacts further, that "any executor being a residuary legatee, may have an action of account against his co-executor, or co-executors, and recover his part of the estate, in the hands of such co-executor, or co-executors; and any other residuary legatee may have the like remedy against the executor; and any person having a legacy bequeathed in any last will and testament, may sue for and recover the same at common law.—Aik. Dig. 183. This statute *in totidem verbis*, gives the action of account to any residuary legatee, against the executor, and the difficulties in the prosecution of such an action, will not allow us to refuse to treat it as a legal remedy. If the principle we have stated in regard to cases in which Courts of Law and Equity exercise a concurrent jurisdiction, be applicable, then is the statute of limitations an available bar for the executors; for the commencement of an action of ac-

count, is limited to six years after the cause of it accrues.—Aik. Dig. 270; and the proof in the record very satisfactorily shows, that the plaintiff attained his majority eight or nine years previous to the filing of his bill. In determining that the statute bars all remedy against the executors for an account and recovery of the plaintiff's residuary legacy, either by action at law, or bill in equity, we are not to be understood as intimating that the same length of time could be urged as a reason why a settlement should not be coerced by the Orphan's Court. What period would be sufficient to authorise the presumption that, a settlement had been made or dispensed with by the parties interested, out of Court, would in general, depend upon collateral and extrinsic circumstances, and consequently cannot be determined until the question arises in judgment.

But even supposing that the statute of limitations does not bar the plaintiff's suit, and we are inclined to think that the amount unaccounted for, is too inconsiderable to authorise a Court of Equity to entertain the case. Taking the account presented to the County Court by Person Davis, to be a correct statement of the estate of Wm Davis, so far as it came to the hands of the executors, and it appears that the sum of two hundred and eighty-nine dollars and forty three and three-fourth cents, have never been accounted for, by them. This account was exhibited in April, 1824. The complainant's distributive share being one thirty-sixth part of that sum, did not with interest added, at the time the bill was filed, amount to more than seventeen dollars and fifty cents. Now it has been considered by this Court, that the statutes regulating appeals from justices of the peace, and the mode of trial in the higher Court, secure to the parties all the justice and equity to which they are entitled; especially where the amount in controversy does not exceed twenty dollars. And consequently it has been holden, that if in any such case, chancery will interfere, it must be where the amount in controversy exceeds twenty dollars.—Williams *et al.* v. Berry. *et al.* 3 Stew't & Porter's Rep. 284. In taking the account to show the *maximum* of the executor's indebtedness, we must not be understood as affirming it to be conclusive against them; for we are by no means sure that the answers of the defendants upon this point, which are responsive to

the bill; and especially when considered in connection with the depositions of some of the legatees, which are in the record, negative the idea that the executors have not fully accounted.

In respect to a tract of land not specifically bequeathed, and which Person Davis relinquished to the United States under one of the laws for the relief of purchasers of the public lands, it very satisfactorily appears, that it was purchased by Person Davis at the government sale of lands at Milledgeville, in 1818, who paid in cash one fourth of the purchase money; that afterwards the testator became a purchaser from him of an undivided moiety, upon paying one half the sum, he had paid to the United States. This arrangement between Person Davis and the testator, was not evidenced by writing; and afterwards the latter stipulated with the former, that if he would hire his negroes, and allow him to live with him during life, he would relinquish to him his entire interest in the land. The contract was performed by Person Davis, and consummated by the death of the testator, while a member of his family. These facts do not show, that by the purchase from the government, Person Davis became a trustee of a moiety of the land for the testator; the latter made no previous agreement to become a joint purchaser, nor did he furnish any part of the purchase money; but it was only after Person Davis became the proprietor, that he acquired an interest with him. The statute of frauds under these circumstances, does not render ineffectual for all purposes, the last contract by which Person Davis was again to have the entire tract of land. Suppose the testator had filed his bill for the specific performance of the first contract by coercing Person Davis to execute the necessary evidence of title to an undivided moiety, would it not have been competent for the defendant to have resisted such a decree by showing that the testator, had agreed with him to relinquish his right to the land for a valuable consideration, which he was willing to perform? Even if such evidence was not admissible as the basis of a right, yet it would be sufficient, to induce a Court of Equity to refuse to be active by decreeing against it.—2 Story's Eq. 80-1. And if an action had been brought by the testator for money paid by him, or for which Person Davis sold the land, it would have availed the defendant to show the facts, as going to establish that the testator had parted with his legal right,

So, that in no view should the executors be held to account for this land as a part of the testator's estate.

2. The proof is entirely satisfactory, to show that all the slaves specifically bequeathed to the children of Sally Wood, were, when the will was made, and for years previously, and have continued ever since, in the possession of Joseph Wood, to whom they had been given by the testator. Such is the evidence of several of the legatees, whose depositions are in the record, and who state, that the testator bequeathed to his other children, the slaves he had previously given them, for the purpose of manifesting that he was alike just and liberal to all.—The concessions made by Joseph Wood, in regard to these slaves, in order to effect an amicable adjustment with his children, cannot prejudice him; and even if admissible for any purpose, would be considered as gratuitous, over-balanced as they are by circumstances, and the positive statements of the witnesses. Equally ineffectual must be the evidence of several witnesses who testify, that about the time Joseph Wood and his children were endeavoring to settle, the former spoke of the slaves in question, as a part of the estate of William Davis, deceased; the conversations related by these witnesses, were expressed in such terms as one who was not very precise in the use of language, or watchful of his rights, might be expected to employ.

The competency of the executors as witnesses, is not explicitly brought to the view of the Court by the assignment of errors, and if it were, we do not think that the admission of their testimony taken after the bill was dismissed as to them, could affect the decree. The statute of limitations operating as a bar in their favour, they could not be charged by the plaintiff, by a suit at law or in equity, for a *devastavit* or other cause:—Again, no objection was made to their evidence in the Court of Chancery, and on writ of error, it must be understood to have been admitted with the plaintiff's assent: And lastly, independent of their testimony, the proof in the cause is entirely sufficient to sustain the decree.

In neither of the points raised, is there any error, and the decree of the Court of Chancery is consequently affirmed with costs.

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RULES OF COURT.

IN THE SUPREME COURT.

Additional Rules for the Regulation of the Practice in Chancery, adopted at the term of the Supreme Court of Alabama, holden in June, 1842.

1. The third, fifth, eighth, nineteenth, twenty-fifth and thirtieth rules, for the regulation of the practice in Chancery, adopted by this Court, at its term holden in January, 1841, are hereby abolished.

2. Where a bill charges that a defendant thereto resides out of this State, if the complainant, or other credible person, make affidavit in writing before the register or a justice of the peace, that such defendant is, as he believes, a non-resident, stating the place where such defendant resides, and that he is of the age of twenty-one years, or if the defendant's residence is not known to the person making affidavit, state therein that the same is unknown: or if the bill sets forth the facts required to be stated in said affidavit, and is sworn to, it shall be the duty of the Register to make an order against such non-resident defendant, requiring him, her, or them, to answer or demur to said bill within such time as he may prescribe therein, not less than sixty nor more than ninety days from the making thereof. Orders of publication as to non-resident defendants, made by the Court during its sitting, shall, as to the time required to answer, be governed by this rule. The Register shall have all orders of publication against non-resident defendants, whether made by the Chancellor or himself, published with as little delay as may be, in such newspaper as may be designated in the order, once a week for four consecutive weeks; a copy of which order he shall post up, at the door of the court-house of the county where the Court sits, and send by mail another copy thereof to the defendant, where his residence is shewn by the bill or

affidavit as aforesaid, which copies shall be posted up, and sent by the mail, within forty days from the making of said order.

3. Infants residing beyond the limits of this State, may be made parties defendants, by publication, according to the foregoing rule; but a copy of the order of publication, instead of being sent to the infant, shall be sent to the persons designated in the fourth rule, for the regulation of Chancery practice, adopted at January term, 1841, in the order therein mentioned. On the expiration of the time required to answer in the order of publication, the Register in vacation, or Chancellor in term time, may appoint a guardian *ad litem*, for the infant defendant. A guardian *ad litem* shall not be required to answer in less than thirty days after his appointment, except in the case provided for in the rule next following. If a guardian *ad litem* fail to answer the bill, for more than thirty days after his appointment, the Register shall file a formal answer in the name of said guardian, denying all the allegations of the bill. No one shall be appointed a guardian *ad litem*, unless he previously consent thereto in writing.

4. If an infant defendant of fourteen years of age, is served with subpœna to answer, and fails to name a guardian *ad litem*, within thirty days thereafter, the Register in vacation, or Chancellor in term time, shall appoint such guardian, who may be superseded by the infant's appearing, either before the Register in vacation or Chancellor in term time, and making choice of another, or having such choice certified by a justice of the peace, to the Court or Register, and on the guardian *ad litem*, if necessary, forthwith putting in an answer for the infant.

5. Commissions to take testimony shall be issued by the register, directed to one or more persons to execute, and shall be issued at any time after ten days service of the interrogatories in chief, on the adverse party or his solicitor, who shall file cross interrogatories within the ten days. The party filing the interrogatories in chief, if cross interrogatories be filed, may file rebutting interrogatories thereto, at any time before the issuance of the commission. The original interrogatories, as well as those in chief, cross and rebutting, (if any) or copies shall accompany the commission, which commission shall contain the usual authority to the commissioner or commissioners, and be executed in the usual manner of taking depositions or inter-

rogatories, without enjoining secrecy on the part of the commissioner or witness, or requiring a private examination. Objection may be made to the rebutting interrogatories, after the publication of the testimony; or to the cross interrogatories, if it appear that there was no opportunity of making it before the commission issued.

6. The testimony of witnesses may be impeached by deposition taken according to the foregoing rule, without filing articles of impeachment.

7. In filing supplemental bills and bills of revivor, it shall not be necessary to recite therein any part of the original bill, or any other subsequent part of the proceedings; but in supplemental bills, it shall be sufficient to refer to the original and state the new matter; and in bills of revivor, the cause requiring a revivor with the appropriate prayer and conclusion.

8. Subpœnas on supplemental bills and bills of revivor, shall be returnable to a day certain, not less than thirty days from the time of their issuance, and on their being executed thirty days, the register in vacation, or chancellor in term time, may, if a supplemental bill be not answered, order the same to be taken *pro confesso*, subject to be set aside on filing a sufficient answer; or, if a bill of revivor, order the suit to stand revived: *Provided*, no subpœna to answer a supplemental bill, or to revive, shall be returnable to a day beyond the first day of the next term: *And, provided further*, that if thirty days do not intervene between the filing of the bill and the next term, the subpœna shall issue returnable to that term, and if executed five days before its commencement, the order *pro confesso*, or to revive, shall be then made; unless good cause shall be shown to the contrary.

9. Orders of publication against non-resident defendants, may be made on supplemental bills and bills of revivor, as directed in the foregoing rule number two, and rule twenty-one, adopted at January term, 1841, and after the expiration of the time required to answer or shew cause, the supplemental bill may be taken *pro confesso*, or the suit revived as to such non-resident defendant.

10. It shall not be necessary to deliver a copy of a supplemental bill or bill of revivor, to a defendant, on serving him with subpœna to answer the same.

11. When a *feme sole* defendant marries pending a suit, upon a suggestion in writing setting forth that fact, her husband may be made a party by service of subpœna and copy of the bill to be issued by the register in vacation, or in the term time, by the chancellor on motion.

12. The rules of the English Court of Chancery, not inconsistent with the statutes of this State, and the rules and decisions of this Court, so far as consistent with the institutions of this country, are hereby adopted as rules of practice in Courts of Chancery in this State.

INDEX.

ABATEMENT.

1. Where the fact of the plaintiff's non-residence does not appear on the proceedings in a suit by attachment, if the defendant would avail himself of it to show their defectiveness, he must plead it in abatement. *Calhoun v. Cozens.* 21.
2. An executor or administrator may report an estate insolvent when the *personal* property is insufficient to pay all the debts; and the effect of such representation, duly certified from the county court, will be to abate all suits then pending. *Wood v. McCann and Witherspoon, adm'rs.* 61.
3. A variance between the writ and declaration can not be reached by general demurrer, but must be brought to the view of the court by plea in abatement. *Curry & Co. v. Paine, adm'r, &c.* 154.
4. The resignation of an executor or administrator, will not abate a suit then pending. If there be more than one, the suit will proceed in the name of, or against those remaining; if he is the sole representative of the estate, the suit will be revived in the name of his successor. *Elliott, adm'x. v. Eslava.* 568.
5. Where a judgment is rendered by a justice of the peace for a sum exceeding fifty dollars, which is removed by appeal to a higher tribunal, the appellate court should not, on motion, vacate the judgment, but the correct practice under the act of 1819, is to put the defendant to plead the want of jurisdiction in abatement. *Bentley et al. v. Wright.* 607.
6. Where suit is instituted by the plaintiff in a mistaken name, and the right name is carried into the declaration, with an averment that the defendant was served with process issued in the mistaken name, the variance between the writ and declaration can be pleaded in abatement, and the defect is not cured by the declaration. *Beene v. The Cahawba and Marion Rail Road Company.* 661.
7. Where a writ issues otherwise than prescribed by law, it must be abated on the plea of the defendant. *Adamson v. Parker, et al.* 727.
See Pleading, 30.

ACCORD AND SATISFACTION.

See Chancery, 19.

ACCOUNT.

See Statute of Limitations, 5.

ACTION.

1. Where L owned five slaves and W owned three others, and it was agreed between them to work them on a plantation, for the joint benefit of L and W; and afterwards a contract was made by L, with the defendant, for services to be performed by the whole number of slaves; L & W may join in an action for the breach of this contract, notwithstanding the defendant was ig-

ACTION—CONTINUED.

- norant of any interest of W in the contract. *McCord v. Love and Williams*. 107.
2. A party who has paid money, or delivered goods, upon a contract that is rescinded, may recover the money in action, for money had and received, may maintain *trover* for his goods, or waive the tort, and bring an action for goods sold and delivered. *Pharr & Beck v. Bachelor*. 237.
 3. The suing out the writ is the commencement of the action. *Cox v. Cooper*. 256.
 4. A note, payable to J. E. or bearer, made previously to the enactment of the statute of 1837—*Meek's Supplement* 108—improperly sued in the name of one who holds it by delivery without any indorsement from J. E. the payee. *Sprowl, et al. v. Simpkins*. 515.
 5. A bond to a number of obligees, conditioned to pay several and distinct judgments in favor of each, must be sued in the name of all the obligees, or the survivors of them, upon the principle, that they in whom the legal interest is vested, must join in an action at law. *Gayle, et al. v. Martin, et al.* 593

See Statute of Limitations, 6.

ACTION, QUI TAM.

See criminal Cases and Proceedings in, 5.

ADMIRALTY PROCEEDINGS.

1. The intervention of a claimant of a vessel libelled, and his entering into stipulation to pay and satisfy the decree, will render it unnecessary to make monition, so far as the claimant is concerned; and the libel will not be dismissed for the failure to do so, although the order of seizure, directs monition to be made generally. *Williamson v. Brooks*, claimant of the *Robert Morris*. 32.
2. A boat being libelled and seized, subsequent to the decree of condemnation and order of sale, a third person interposed as claimant, and executed a bond for the prosecution of a writ of error.—*Held*, that the bond had no other effect than to arrest proceedings until the judgment of the appellate court was rendered, and upon the affirmance of the decree, it was competent to execute the order of sale. This being the case, a bond subsequently executed to the libellants, in consideration of relinquishing their lien, conditioned to pay the judgments in their favor, should they not be reversed, is good as a common law obligation. *Gayle, et al. v. Martin, et al.* 593.

AD QUOD DAMNUM, WRIT OF.

1. In proceeding by writ of *ad quod damnum*, to establish a mill, its location should be ascertained, either by the inquest or the judgment of the court, with sufficient certainty of description to enable a surveyor to find the place designated. Nothing can be claimed under a grant to build a mill in section number seven, in township nineteen, of range twenty-five; as the location is not sufficiently definite. *Macon and Stephens v. Owen*. 116.
2. Where a writ of *ad quod damnum* was sued out on the seventh of September, 1836, returnable to the next term of the Orphans' Court, (which holds its session monthly) and no proceedings are had on it until the next February, it is considered as abandoned, and a grant to build a mill, afterwards made on this writ, will not over-reach a grant made to another, who sued out this writ in December, 1836, and prosecuted it without delay, so as to obtain a judgment in January, 1837. *Ibid*.

AMENDMENT.

1. Where an attachment is sued out as auxiliary to a suit commenced in the ordinary mode, a mistake in the writ of attachment, of the time when the

AMENDMENT—CONTINUED.

court is held, in which the original suit is pending, is *amendable*. *Scott v. Macy, et als.* 250.

2. A judgment *nunc pro tunc* may be entered or amended at a subsequent term, even without notice, if there is any order or memorandum of record to warrant it. *Bentley, et al. v. Wright.* 607.
3. Where a declaration is filed against two, and leave is given to the plaintiff, to amend by striking out the name of one, the amendment need not be made in fact; the granting of leave will operate to complete it. *Palmer v. Lesne.* 741.

See Forcible Entry and Detainer. 6.

See Practice at Law, 29.

APPEALS AND CERTIORARI.

1. An appeal from the judgment of a justice of the peace cannot be tried at the first term of the court to which the appeal is prosecuted, unless it appear that the appellee, his agent or attorney, has had five days notice of the appeal previous to the term to which the appeal is taken, or unless the constable return *non est inventus* to the notice issued by the magistrate. *Hancock v. Holmes.* 9.
2. On appeal from a justice of the peace, the amount of damages laid in the declaration is matter of form, and cannot be looked to to show that the court had no jurisdiction: that is ascertained by the amount of the recovery. *Cothran et al v. Weir.* 24.

See Forcible Entry and Detainer, 5.

See Jurisdiction, 4, 5.

See Supersedeas, 3.

ASSUMPSIT, ACTION OF.

1. The action of assumpsit may be maintained by the assignee, for the recovery of the money, against the attorney, after notice of the assignment, and demand of the proceeds of the judgment. *Gayle & Saffold v. Benson.* 234.
2. Damages equal to the statute rate of interest, are recoverable upon a sum of money due for the *use and occupation* of a house, &c. *Cooke v. Farinholt.* 384.
3. The defendant addressed a letter to C, (one of the plaintiffs) at the city of Mobile, requesting him to send him goods according to a bill annexed: C and his co-plaintiffs were doing business as partners and commission merchants in the city of Mobile, and not otherwise, and the defendant resided in the interior about two hundred miles distant. The plaintiffs sent the goods, but without a bill of lading or letter; the agent of the defendant, as well as his principal, supposing, that they were sent by C individually, and that to him alone the defendant was accountable—*Held*, that the plaintiffs were entitled to recover in an action for goods sold and delivered. *Child, Hibbler & Pearson v. Wofford.* 564.
4. A corporation may maintain assumpsit upon a contract to take its stock at a specific price. *Beene v. The Cahawba and Marion Rail Road Company.* 660.
5. So, also, it may declare on a contract to take stock agreeably to the provisions of its charter; and to such a declaration the common counts may be added. *Ibid.*

See Action, 2.

See Indorsement, 4.

ATTACHMENT.

1. Upon a motion to quash an attachment, every thing stated in the proceedings must be taken to be true, and nothing beyond, shall be intended prejudicial to the plaintiff. *Calhoun v. Cozzens*. 21.
2. It will not be inferred against the plaintiff on a motion to quash, that he is a non-resident, merely because the affidavit on which the attachment is founded, goes beyond what is necessary, where the proceeding is by a resident creditor against a non-resident debtor; and because the bond is indorsed with the approval of the Judge of the county court. And such is the law, notwithstanding the superfluous facts stated in the affidavit, and the approval of the bond would seem to indicate that they were intended to conform to the remedy when prosecuted by a non-resident creditor. *Ibid*.
3. Where the fact of the plaintiff's non-residence does not appear on the proceedings in a suit by attachment, if the defendant would avail himself of it to show their defectiveness, he must plead it in abatement. *Ibid*.
4. An appearance by the defendant in a suit, commenced by attachment, will have the same effect as a waiver, as it would have in a suit commenced in the usual mode. *Burroughs v. Wright*. 43.
5. The affidavit for an attachment need not declare the manner in which the debt sworn to, accrued. *Starke v. Marshall & Cammack*. 44.
6. Under the attachment act of 1833, Aikin's Digest, 37, the writ could only be executed in the county to which it was returnable, otherwise, under the act of 1837. P. P. 65, sec. 12. *Ibid*.
7. A debt in suit, may under the attachment law of this State, be attached at the suit of a creditor of the plaintiff, in the same Court, where the suit is pending. *Hitt v. Lacey*. 104.
8. Where an attachment is sued out as auxiliary to a suit commenced in the ordinary mode, a mistake in the writ of attachment, of the time when the court is held, in which the original suit is pending, is *amendable*. *Scott v. Macy, et als*. 250.
9. An attachment will not be quashed on account of a defective bond, unless the plaintiff is unwilling to execute a good bond. *Ibid*.
10. An administrator may plead the insolvency of the estate committed to his charge, in abatement of a suit by *capias*, in the life-time of the intestate, in which an attachment also was sued out as an auxiliary process, and levied on real and personal estate. And the lien of such attachment is only an inchoate right dependent on the judgment, which not being allowed, the lien is gone. *Hale, adm'r v. Cummings & Spyker*. 398.
11. If an affidavit is actually sworn to before the justice who issues the attachment, his omission to certify the affidavit, will not vitiate the proceedings.—*McCartney v. The Branch Bank at Huntsville*. 709.

See Bonds, 9.

See Error, and Writ of, 12, 13.

See Execution, Writ of, 4.

See Pleading, 5.

BAIL.

1. When the sheriff takes insufficient bail, and on motion of the plaintiff he is substituted for the bail so taken by him, the bail is entitled, on motion, to have an *exoneretur* entered on the bail piece. *Smith v. Dennis*. 248.

BANK.

1. In a summary proceeding, by motion, at the suit of the Bank, it is not necessary that the notice should be served thirty days before the commencement of the term of the court, or that the motion should be made on any certain day,

BANK—CONTINUED.

- unless perhaps, the notice in this respect is special. *Ticknor v. The Branch Bank at Montgomery.* 135.
2. In a summary proceeding by a Bank, the judgment entry, if the judgment is by default, must shew a legal title in the Bank to maintain the action; and where, in such a judgment, the note is described as payable to Andrew Armstrong, cashier, or bearer, the legal title will not be presumed to be in the Bank, unless the judgment entry shows the note to be endorsed to the Bank; or unless the judgment entry avers the note to have been made payable to the Bank, by the name and description of Andrew Armstrong, cashier.—*McWalker v. The Branch of the Bank of the State of Alabama at Mobile.* 153.
 3. The Bank can not recover, by motion, on a note payable to *Andrew Armstrong, or bearer*, without a transfer of the legal interest, or an averment showing that it was made to the Bank, by that name, &c. *Huntington and Sims v. The Branch Bank at Mobile.* 186.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When the holder of a bill of exchange and the party sought to be charged on it, reside in the same place, notice of the dishonor of the bill must be given him *personally*. *Foster v. McDonald.* 34.
2. Where a bill is remitted to, or placed in the hands of a factor or agent, for presentment, for acceptance, or payment, the agent is not bound to give the party sought to be charged, notice of the dishonor of the bill, but may notify his principal of the fact, and a seasonable notice from him to such party, will be sufficient. But if the agent should give the necessary notice, it will be sufficient. *Ibid.*
3. If the acceptor of a bill fails to pay it, at maturity, so that it is necessary to protest it in order to charge the drawer and endorser with damages, the acceptor is liable to refund to the holder the notarial fees. *Ticknor v. The Branch Bank at Montgomery.* 135.
4. When a note is signed in blank, for the purpose of being filled up for a particular amount, and to be used in a particular mode, and it is filled up afterwards for a different sum, or employed in a different manner, a *bona fide* holder or purchaser may recover on it, although he knew it was signed in blank, if ignorant of the purpose for which it was made. *Huntington and Sims v. The Branch Bank at Mobile.* 186.
5. Where a note or bill is dated at a particular place, it is not sufficient, in order to charge an indorser, to send him a notice by mail, to that place, if he lives nearer and is in the habit of receiving his letters at another post office; unless the holder has used reasonable diligence to ascertain his address.—*The Branch of the Bank of the State of Alabama at Decatur v. Peirce.* 321.
6. The holder of paper is supposed to employ proper diligence to ascertain the indorser's address, if he makes inquiry of different persons living at the place where the paper is payable, whom he may suppose the most likely to give the desired information; and if such inquiries are unavailing, it will be sufficient if he send by mail, a notice addressed to the indorser at the place where the paper is dated. *Ibid.*
7. Where a promissory note is payable to the plaintiff *generally*, this is an admission of his right to receive the amount, and estops the defendant from insisting that the beneficial interest is in others; especially, when it is admitted on the record that the plaintiff was authorised to take the note in the form he did. *Grigsby's ex'r and ext'x v. Nance.* 347.
8. A note, payable to J. E. or bearer, made previously to the enactment of the

BILLS OF EXCH. AND PROMISSORY NOTES—CONTINUED.

statute of 1837—Meek's Supplement 108—improperly sued in the name of one who holds it by delivery without any indorsement from J. E. the payee. Sprowl, *et al.* v. Simpkins. 515.

9. Inland bills of exchange carry damages, when protested for non-acceptance, by virtue of the statutes. Moore v. Bradford. 550.
10. A promise to accept a bill thereafter to be drawn, for goods to be sold to a third person, is binding in law, and an action will lie for its breach; although at the time the promise was made, the amount of the bill, or precise period when it was payable was unknown: and it is no objection to a bill drawn and presented upon the faith of such a general promise, that it had four months to run, and that interest was calculated on the account, for goods sold—such being the usual course of dealing, and the drawee making no objection when the bill was presented for acceptance. Kennedy's ex'rs v. Geddes & Co. 581.
11. The holder of a bill of exchange may sue all the parties to the bill, or either, at his election, but can have but one satisfaction. Abercrombie v. Knox, Snodgrass, *et als*, and cross bill of Riddle v. Abercrombie and others. 728.
12. The mere omission to sue any party to the bill, or the failure to sue out execution against any prior party to a bill, will not discharge the liability of a subsequent party; but to produce that result, there must be an agreement by the holder with such prior party, on sufficient consideration for delay, by which he has tied up his hands from proceeding. *Ibid.*

See Consideration, 1.

See Set-off, 4.

BONDS.

1. Reid and Hoyt and one Hanrick agreed to become the sureties of W, in a bond about to be executed by him as executor: afterwards, Reid and Hoyt signed and sealed a bond, and delivered it to W, to become their deed in the event that Hanrick executed it also as surety. Hanrick never executed it, but the bond was delivered by W to the Judge of the county court, as the deed of Reid and Hoyt. In a suit against them on the bond, to which they pleaded that the deed was delivered as an *escrow* merely—*Held*: First, That a bond may be delivered conditionally to a co-obligor, and will not be operative as the deed of the party, until the condition is performed. Second, That W was a competent witness to prove such conditional delivery, having been released by Reid and Hoyt. 3d, That the previous agreement, that Hanrick should be a surety, could not be given in evidence, because it did not refer to the bond which was actually executed, and therefore, not a part of the *res gestæ*. Bibb, Judge, &c. v. Reid & Hoyt. 88.
2. The act of 1824, "concerning prisons and prisoners," requires a prison-bonds bond, taken on process issued by a justice of the peace, to be filed in the clerk's office of the county court; and requires that court, on motion, to grant judgment and award execution against the obligors; consequently, the justice of the peace has no right to entertain proceedings upon such bond. Davis and Black v. White. 131.
3. An instrument of writing, made 24th November, 1836, by which the defendant undertakes to make titles to a tract of land at a certain day, and in case he fail to do so, to pay a certain sum of money, is not a sealed instrument, although it concludes with "witness my hand and seal"—unless a scrawl or seal is attached to the signature. The act of 1839, (p. p. 99,) declares that such an instrument shall be taken as sealed, but this act has no retrospective operation. Williams, use, &c. v. Young. 145.

BONDS—CONTINUED.

4. Whenever a claim to property levied on, has been interposed in due form, the constable is released from damages at the suit of the claimant. *Murray, adm'r v. Ezell.* 148.
5. When the condition of the writ of error bond, recites the suing out of a writ of error, and the superseding of a judgment against two defendants, and the judgment is against one only, no summary judgment can be rendered against the surety, because it, (the bond,) is not applicable to the case sent up, and could not legally supersede the judgment in the court below. *Curry v. Barclay.* 484.
6. A boat being libelled and seized, subsequent to the decree of condemnation and order of sale, a third person interposed as claimant, and executed a bond for the prosecution of a writ of error—*Held*, that the bond had no other effect than to arrest proceedings until the judgment of the appellate court was rendered, and upon the affirmance of the decree, it was competent to execute the order of sale. This being the case, a bond subsequently executed to the libellants, in consideration of relinquishing their lien, conditioned to pay the judgments in their favor, should they not be reversed, is good as a common law obligation. *Gayle, et al. v. Martin, et al.* 593.
7. A bond to a number of obligees, conditioned to pay several and distinct judgments in favor of each, must be sued in the name of all the obligees, or the survivors of them, upon the principle, that they in whom the legal interest is vested, must join in an action at law. *Ibid.*
8. A bond, conditioned that the principal obligor shall perform the duties of treasurer, under an ordinance of the city of Tuscaloosa, it being shown that the only duties imposed by this ordinance, are in relation to the issuing of change bills in violation of the statute, is void, and no action can be maintained on it. *The Mayor and Aldermen of the city of Tuscaloosa v. Lacy, et al.* 618.
9. The replevy bond required by the 6th section of the act of 23d December, 1837, "to explain and amend the law in relation to attachments," may be executed by a stranger. *Kinney v. Mallory.* 626.

See Attachment, 2.

See Insolvent Debtors, 2.

CHANCERY.

1. Chancery will not enforce the specific performance of a contract for the sale of lands, where it appears from the allegations of the bill, that the vendor has no title; for such a decree would be to compel the performance of an unlawful act. *Fitzpatrick, et al. v. Featherstone and McDougald.* 40.
2. A contract for the purchase of land, will not be rescinded, where the purchaser, does not offer to return the land to the vendor; and a bill which alleges the inability of the vendor to make title, but declares the willingness of the vendee to pay the purchase money, upon receiving a complete title, does not authorise a decree to rescind the contract. *Ibid.*
3. Where a bill is filed to obtain an injunction, and dismissed generally, such a decree will not bar an original bill for relief, in which other questions shall be presented. *Ibid.*
4. A patent for lands, the invalidity of which appears by inspection, will not authorise a recovery, and it is unnecessary to resort to Equity, to vacate it. *Doe, ex. dem. Pollard's heirs v. Files.* 47.
5. An order made upon a bill intended as a bill of review, which suspends proceedings on the decree, in the original cause, ceases to be operative after such bill is dismissed for want of equity. *Hogan v. Davis and wife.* 70.

CHANCERY—CONTINUED.

6. A motion to dismiss a cause in chancery, for want of equity, may be made at any stage of the proceeding—it admits the allegations of the bill to be true, and is to be determined upon an inspection of the bill only. *Bryant, et al. v. Peters, et al.* 160.
7. In a bill by the heirs and distributees, against one assuming to act as administrator, it was alleged that the complainants could find no order granting administration, nor any administration bond in the Orphans' court of the county from which he pretends to have derived his authority; and consequently, they believed the defendant was never appointed administrator; and further, they believe he will waste the decedent's estate, and remove from the State—*Held*, that the allegation authorised the interference of equity for the purpose of "precautionary justice." *Ibid.*
8. It is competent for a court of equity to compel the production of deeds and other writings, where the party complaining shows *prima facie*, that his interest requires it. And an administrator may, at the suit of the heirs, devisees and other persons entitled, be required to deliver up the titled deeds of their respective estates. *Ibid.*
9. The cause was called for hearing, and there being no replication to the answer, or depositions taken for either party, a motion was made by the complainant to amend his bill—*Held*, that the amendment should have been allowed. *Ibid.*
10. In the execution of a will, questions may arise, which the Orphans' court is incompetent to determine; and where a trust technically so called, is required to be enforced, a court of equity must be resorted to. *Elliott v. Mayfield and wife.* 223.
11. A vendee of land in possession, may have relief in chancery, when the vendor has made a fraudulent representation as to the title. *Spence v. Duren, et als.* 251.
12. But the assertion of the vendor, that his title was good, is not fraudulent, unless he *knew* that a better title existed in another. *Ibid.*
13. The facts, as to which a discovery is sought, and the action of the court demanded, must be stated with reasonable certainty and precision, and the allegations be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer them. *Ibid.*
14. A court of chancery will never impute fraud when the facts and circumstances out of which it must arise, may consist with pure intentions. *Steele v. Kinkle & Lehr.* 352.
15. A court of chancery will not aid a purchaser to rescind a contract, even in a case of fraud, where there has been a want of common and ordinary diligence. *Ibid.*
16. When the vendor of land fraudulently induces the vendee to purchase, by showing him lands of a superior quality, which are purchased, and afterwards lands of inferior quality are conveyed, the vendee can not make a defence at law, when sued for the purchase money. His relief is in equity, which can render complete justice to each party, by rescinding the contract, or allowing compensation. *Calloway v. McElroy and Flannagin.* 406.
17. An unsuccessful attempt to defend at law, when no defence could there be made, under the circumstances of the case, will not preclude a party from relief, in a court of equity. *Ibid.*
18. It is no cause to dismiss a bill for relief, that the complainant admits that the only witnesses by which he can prove his case, are interested, so as to be

CHANCERY—CONTINUED.

- incompetent at the time when the bill is exhibited, because their interest may be removed before the hearing. *Ibid.*
19. An offer to compromise, which is not accepted, will not preclude relief in equity, although payment may subsequently be made by an agreement between the parties, by giving notes due from other persons. The question of accord and satisfaction is matter of defence, and it will not be inferred from the payment in this mode. *Ibid.*
 20. Although the complainant may make out, by proof, a case which entitles him to relief, yet he cannot recover upon a bill, the allegations of which are not adapted to the case proved. *Gibson, et al. v. Carson's adm'r.* 421.
 21. The court of chancery decreed that an absolute deed of land be set aside, and that the defendants re-convey one undivided moiety to the complainant, and that it be referred to the master to report a conveyance, and take an account of advances of money, rents and profits, &c.—*Held*, that the defendant had a lien on the land, in virtue of the legal estate with which he was invested, for any balance that might be found due him on taking an account, and that the court of chancery should not direct a conveyance to be reported and executed before the master had taken an account, unless such conveyance reserved this lien. *Kennedy's heirs and ex'rs v. Kennedy's heirs.* 434.
 22. A party indebted to others, in the sum of sixteen hundred dollars, or thereabouts, executed an absolute conveyance of real estate, in which the consideration expressed was eight thousand five hundred dollars; afterwards, the property was sold under execution and purchased by the judgment creditor. The grantees in the deed, filed their bill against the grantor and the purchaser, stating that although unconditional in its terms, it was intended as a mere security for what was due, and praying that they might have the benefit of it as such. It was admitted that the deed would not authorise a recovery at law, but would be there considered as fraudulent. *Held*, that being void for fraud in fact, it was void *in toto*, and could not be enforced to any extent in equity. *Moore & Paine v. Tarlton and Paine.* 444.
 23. A bill for the foreclosure of a mortgage executed for the security of a promissory note, is not demurrable because the note is not exhibited, although there may be other defendants than the mortgagor himself. *Fenno, et al. v. Sayre & Converse.* 458.
 24. Where a bill was filed to foreclose a mortgage and for general relief, against the mortgagor and other incumbrancers, upon the assumption that the complainant's lien is paramount; although this assumption is false, the bill will not be defective for omitting to offer to pay to the superior incumbrancers, what may be due them. *Ibid.*
 25. An allegation in a bill, that the complainants were proprietors of a note intended to be secured by the mortgage sought to be foreclosed, is sufficient, though it does not appear how they became proprietors. *Ibid.*
 26. The complainants as against L one of the defendants, stated that they have been informed he claims some interest in some part of the lands in question, but will not assert that it was founded on a usurious or gaming consideration. They further state, that all the defendants acted with a full knowledge of their rights, and that they caused their mortgage to be recorded, &c. before any of the defendants rights attached. On these statements they call on L to set forth his contract &c.; when the same took place—the amount of money paid, &c.—whether any part of the consideration of his payment was founded in usury, or gaming, &c. *Held*, that the interrogato-

CHANCERY—CONTINUED.

- ries were authorised by the allegations, and that the answer of L responsive to them, was evidence. *Ibid.*
27. An execution at the suit of S against the husband of the complainant, having been levied on certain slaves, she filed her bill to enjoin the sale, alleging, 1st, That she is entitled to a separate estate in the property, under the will of her father. 2d, If she is not entitled to a separate estate, then herself and son, by a former marriage, are entitled to an exclusive interest in the slaves, in virtue of the laws of Louisiana, where she was domiciled, and in possession of them, at the time of her last marriage; and, 3d, If both the preceding grounds fail, then she claims to hold by the permission of the administrator of her first husband, and as *Dative Tutrix* of her son, appointed in Louisiana—the property never having been distributed: *Held*, that the bill was not demurrable for want of equity, want of parties, or multifariousness; that its purpose was not to put her in the enjoyment of what she supposes to be her right, but to obtain the protective power of chancery, to prevent a disturbance of her possession, and the different allegations are regarded as the assertion of so many reasons why it should be granted. *Lewen, by her next friend, v. Stone, et al.* 485.
28. The complainant alleged, that she was to hold certain slaves, which she claimed under a deed of gift, agreeably to a statute of Mississippi, for the protection of the property of married women. The terms of the act were not more particularly recited, but it was alleged that the slaves were given by the deed, to be held by the complainant to her separate use, benefit, &c. during life, and to the heirs of her body thereafter. *Held*, that the bill was not demurrable for the omission to state the provisions of the statute referred to, the more especially as the interest set up by complainant was alleged to be an estate to her separate use. *Calhoun, by her next friend, v. Cozens, et al.* 498.
29. The sickness of a party to a suit, or the pendency of another suit against him requiring his attendance, will not authorise the interference of a court of chancery after judgment. It was the duty of the party to send an agent to attend to his cause, or to put his attorney in possession of the means of continuing it. *Pharr & Beck v. Reynolds.* 521.
30. A court of chancery will not grant relief in the nature of a new trial at law, after judgment on a plea in abatement. *Ibid.*
31. When chancery has jurisdiction to state an account between parties, it will enjoin a judgment at law, obtained by the party against whom the account is prayed, if he be insolvent. *Ibid.*
32. E desiring to foreclose a mortgage made to secure a note, held by her, applied by her counsel to L, for information, who pointed out to him the mortgage on the records of the county court, and thereupon E filed a bill in the name of L, and others, to foreclose the mortgage. A decree being had, L became the purchaser, at the sale of the mortgaged premises; afterwards a reference was made to the master, to enquire, whether the mortgage had not been foreclosed previously; and upon the admission of L, that it had not, and that the note in the case, was the property of the estate of John Elliot, reported that fact, and that L was the purchaser at the sale; whereupon the sale was confirmed. L afterwards discovering that the mortgage had been previously foreclosed by himself, and the property sold, refused to pay the purchase money; whereupon, at the instance of E, an attachment was directed to issue against L, to compel the payment of the purchase money. *Held*, 1st, That E was, by consent a party to the record, otherwise, the presumption must be that L was himself entitled to the money and all the proceedings at

CHANCERY—CONTINUED.

- the instance of E, void. 2. That although L was a complainant on the record, yet the fact being that the suit was instituted by E, for her own benefit, L must be considered on a motion to set aside the sale, as a stranger. 3. That under the facts of the case, the attachment should not have been awarded. 4. That as both parties were in fault, each pay his own costs. *Lyon v. Elliott, adm'rx.* 654.
33. The bill alleged, that on the 4th November, 1818, the testator of the defendant for a valuable consideration, with one E. E. Parks, made his note to the complainant for five thousand dollars, payable sixty-one days after date, at the branch bank at Milledgeville; that the note was negotiated and discounted at the bank, and the money obtained by the deceased, and that the complainant was afterwards compelled to purchase up the note from the bank: *Held*, that this allegation did not show an original indebtedness from the deceased to the complainant, evidenced by the note, but must be understood to mean that the note was made to be discounted in the bank for the purpose of raising money, and that the complainant paid it to the bank as endorser; otherwise, the payment would be voluntary, and would create no legal obligation. *Borland v. Phillips, et als*
34. That such being the allegation, proof of the note, merely, would not establish the liability of the maker of the note, but that it was necessary to go further, and to prove the payment of the money to the bank. *Ibid.*
35. A decree cannot be made out of the scope and design of the bill, and especially against an infant, against whom no relief is prayed, and who is not liable immediately. *Ibid.*
36. An allegation that a sum of money, which has been paid, has not been credited on the execution, is not sufficient to give a court of chancery jurisdiction, unless it is also charged, that the plaintiff refuses to enter the credit on the execution, or that he is attempting to enforce payment a second time. *Abercrombie v. Knox, Snodgrass, et als.* and cross bill of *Riddle v. Abercrombie* and others. 729.
37. A creditor cannot be compelled to exhaust his remedy against the principal debtor before he resort to the surety, unless under peculiar circumstances, rendering it proper that a court of chancery should interfere. *Ibid.*
38. Courts of chancery have jurisdiction where a bill is filed to recover a slave in specie, under peculiar circumstances; as where the slave is a family negro, and a strong attachment exists towards the slave, so that damages would not be an adequate compensation, but an allegation that the negro is a "family slave," and that the complainants felt that personal regard for her which is usually felt for property of this kind," is not sufficient to oust the common law court of jurisdiction, and confer it on a court of chancery. *Hardeman, et als. v. Sims, et als.* 747.
39. A court of chancery will not entertain a bill where the amount in controversy is so inconsiderable as seventeen dollars and fifty cents. *Wood v. Wood, et al.* 756.
- See Practice in Chancery*, 1, 2, 6, 12.
- See Mortgage*, 1.
- See Lien* 4, 9.
- See Husband and Wife*, 1, 2.
- See Will, and Probate of*, 1.
- See Gift*, 1, 2.
- See Delivery Bond*, 1.
- See Executors and Administrators*, 9.
- See Evidence*, 42.

CHANCERY—CONTINUED.

See Guardian and Ward, 2.

See Legacy and Distributive share, 5.

See Statute of Limitations, 7, 8.

CITIZEN.

1. A person who removed to the territory of Louisiana after the treaty of Paris, in 1803, and before its admission into the Union as a State, and was an inhabitant thereof from the time of his removal until after the adoption of the State Constitution, and its admission into the Union, does not thereby become a citizen of the United States. *The State v. Primrose*. 546.

CONSIDERATION.

1. Where a clock pedler, without license, sold a clock, for which the purchaser executed two notes, which afterwards were given up by the partner of the pedler, and a new note, payable to himself, was taken, the latter note is without any legal consideration, in as much as the first notes were wholly void by the statute, and can not be recovered in a suit by the payee. *Bragg v. Channell*. 275.
2. A plea that a note or bond was given without any consideration, is good under our statute. *Giles v. Williams, use, &c.* 316.
3. A plea impeaching the consideration of a bond given for the purchase of land, which does not show either that the contract has been rescinded, or that the purchaser has lost the possession of the land, is bad. *Ibid.*
4. A plea alledging that a "bond was obtained by fraud, covin and misrepresentation is bad. Even in this State, where the consideration of a bond may be impeached, the facts which constitute the fraud must be stated.—*Ibid.*

CONSTITUTIONAL LAW.

1. Congress does not possess the constitutional power to grant the shore of the navigable waters within this State; and the fact that the grantee had an inoperative Spanish grant for the same, cannot legalize the act of Congress. *Doe, ex dem. Pollard's heirs v. Files*. 47.
2. A power granted to the corporation of the City of Mobile, "to license bakers, and regulate the weight and price of bread, and prohibit the baking for sale, except by those licensed," is not contrary to the constitution of the State.—*The Mayor and Aldermen of Mobile v. Yuille*. 137.
3. The notes issued by the Bank of the State of Alabama and its Branches, are not "bills of credit," within the prohibition of the Constitution of the United States. *Owen, et al. v. The Branch Bank at Mobile*. 258.
4. The Congress of the United States does not possess the constitutional power to grant the shore of the navigable waters in this State. *The cases of The Mayor, &c. of Mobile v. Eslava and Hagan, et al. v. Campbell and Cleveland*, explained and re-affirmed. *Kemp, ex dem. Pollard's heirs v. Thorpe, et al.* 291.
5. The act authorising the coroner, temporarily to fill the office of sheriff, when a vacancy occurs, until the Executive appoints, is not in conflict with the constitutional provision giving the appointment in case of vacancy, to the Governor. *The State of Alabama v. Monk*. 415.

CONTEMPT.

1. Whenever the law affords any other adequate remedy, by which a party can enforce his rights, the proceeding by attachment for a contempt, is always within the discretion of the court; and a refusal to exercise it, can not properly be reviewed by appeal, or by writ of error. *Wyatt v. Magee*. 94.

CONTRACT.

1. A contract by J, to deliver the entire crop of cotton which he might make during the year 1838, estimated at one hundred and seven bales, can not be declared on as a contract to deliver one hundred and seven bales of cotton absolutely, and without condition. *Bell v. The Real Estate Banking Company of Starkeville, Miss.* 77.
2. The proper construction of such a contract is, that it is an agreement to deliver the entire crop made by J, in the year 1838: and if he acted in good faith, and made no cotton, there is no breach; if a crop was made, but not delivered, the sureties to the contract are liable only to the extent of the value of the cotton made. *Ibid.*
3. A writing purporting to contain the terms of a contract, but which the parties never executed by signing, cannot be read as evidence of the contract between the parties. *Vastbinder v. Metcalf.* 100.
4. Where L owned five slaves and W owned three others, and it was agreed between them to work them on a plantation, for the joint benefit of L and W; and afterwards a contract was made by L, with the defendant, for services to be performed by the whole number of slaves; L & W may join in an action for the breach of this contract, notwithstanding the defendant was ignorant of any interest of W in the contract. *McCord v. Love and Williams.* 107.
5. Where a workman agrees to complete the carpenter's work on a house, and to receive a certain sum on the completion of the work—his employer furnishing the materials—and the house and materials were destroyed by fire, without the fault of the workman—the house being in the possession of the employer. *Held*, that the workman could not recover a *pro rata* compensation for the work actually done. *Brumby v. Smith.* 123.
6. The plaintiff declared on a written contract, made the 9th July, 1838, to teach an English school *for that year*: the contract produced, was dated of that day, and was a stipulation to teach an English School *for one year*, without stating when it began—*Held*, that the contract given in evidence was variant from that declared on, and consequently inadmissible. *McLendon v. Godfrey.* 181.
7. Where several persons employed an individual to teach school for them, stipulating if they dismissed him before the term of employment expired, that they would pay him for the time he was engaged—*Held*, that taking the scholars from the school under circumstances to show they were not to be sent back, indicated a willingness to dispense with the teacher's services, and was tantamount to a dismissal. *Ibid.*
8. It appeared by a covenant executed by both parties, that P formerly had purchased two tracts of land from T; but, having failed to pay for them, the contract of sale was rescinded—T covenanting that P should remain in possession until the 25th December, 1838, at which time he was to surrender the premises; but, both parties covenanted to use their best endeavors, in the mean time, to sell the land, and if they succeeded in obtaining three thousand one hundred and fifty-two dollars, or more, P. was to receive the overplus. *Held*, 1. That either party was at liberty to sell the land, provided the sum named could be obtained; but T was not obliged to part with his title until that sum was paid to him in money. 2. That T was not obliged, nor P authorised, to sell upon credit. 3. That if a new agreement was entered into, by which T agreed to receive notes, or any other thing, or to sell the land on a credit, this agreement could not be subjoined to a covenant, so as to authorise a recovery for the damages consequent on the breach of the new agreement, in the suit on the covenant. 4. That to entitle P to recover

CONTRACT—CONTINUED.

- damages of T, for not using his best endeavors to sell the land, it must appear that more than three thousand one hundred and fifty-two dollars could have been obtained by T; as otherwise, there could be no overplus, and P not being entitled to any collateral advantages arising from the sale, in consequence of an agreement between him and the contemplated purchaser.—
5. When breaches are assigned in a declaration on a covenant, and one of them is defective, no advantage can be taken by general demurrer. 6. It is error in the county court to refuse the defendant permission to withdraw a plea; and consequently, the issue formed on it, in an action of covenant, when all the expenses incident to the issue are offered to be paid. *Taylor v. Pope*. 190.
9. When a note is deposited with a Bank for collection, and no special agreement is made, the contract to be implied, is one of agency; and no other duties are imposed by law, on a Bank, different from those imposed on any other agent. The first duty of an agent, in such a case is, to follow his instructions; if none are given, it is his duty to present the note at the time and place fixed for payment; or if no place is designated, to use due diligence to make a demand; if payment is refused, it is then his duty to give immediate notice to his principal, that he may take the measures necessary for his own security. These duties are imposed by the general law of agency; but others may arise out of local laws; as if damages are given on the protest of a note; or if a protest is essential to fix the liabilities of other parties. *The Bank of Mobile v. Huggins, adm'r of Vedder, survivor of Blair & Vedder*. 206.
10. A contract cannot be rescinded *in toto*, by one of the parties, where both parties cannot be placed *in statu quo*; but a contract will be considered as rescinded, where the party who is to perform an act, has made his performance impracticable, or where he is prevented from doing the act by the other party. *Pharr & Beck v. Bachelor*. 237.
11. To constitute a conditional contract with a physician, that if he did not cure the patient, he was to receive no compensation, it is not necessary that a specific price should be agreed on. A contract, that if he cured, he should be entitled to a reasonable compensation, is valid, and will be enforced—*Mock v. Kelly*. 387.
12. Where one engages to serve another as an overseer for twelve months, and leaves his employer during the year, without his consent, or any sufficient reason, he can not recover compensation for the services actually rendered. *Pettigrew v. Bishop*. 440.
13. A contract to carry cotton from a landing on the Tennessee river to New-Orleans, at fifty cents per hundred pounds, although in writing, does not preclude the boat owner from showing the existence of a custom on that river, of charging lighterage, in addition to the freight, whenever the tide in the river is so low throughout the season, as to prevent cotton boats from passing the Muscle Shoals. *Andrews, use, &c. v. Roach & Coffey*. 590.
14. N agreed to employ M to keep a grocery for him for twelve months, at the rate of twelve dollars a month; to furnish him provisions, liquors, &c., and agreed that N might pay him one dollar and fifty cents for each gallon of whiskey sold, and retain the surplus, instead of the wages agreed on. *Held*, that while the contract was subsisting, N had no right to leave the employ of M, before the expiration of the twelve months, and that if he did, his right to compensation was gone. *Norris v. Moore*. 676.
15. Where the seller of goods makes a false representation as to their quality and

CONTRACT—CONTINUED.

- condition, the buyer, upon ascertaining it, may rescind his contract. *Ma-gee v. Billingsley*. 680.
- See Pleading*, 14.
- See Assumpsit, Action of*, 3.
- See Bills of Exchange and Promissory notes*, 12.
- See Indorsement*, 1.
- See Corporation, and By-Laws*, 5.
- See Sale of Chattels*, 1.
- See Principal and Agent*, 8.

CORONER.

1. The act authorising the coroner to act, when the sheriff is a party in interest to any suit, and perform all the duties of sheriff, whenever, from any cause, he may be incompetent to act as such, Aik. Dig. 96, is in affirmance of the common law, and merely authorises the coroner to act, when the sheriff is temporarily incompetent to act, from relationship, interest, &c. &c. but does not apply when the sheriff is *unable* to act. *The State of Alabama v. Monk*. 415.
 2. Process intended to be executed by the coroner should be directed to him *eo nomine*; but where a writ directed to the sheriff is executed by the coroner, it will be intended, after a judgment by default, that the direction was proper, and the process received by the sheriff; and as the duties of sheriff, in the event of a vacancy in the office, are devolved upon the coroner by statute, that the contingency had happened and the process was received by the coroner from the sheriff's office. *Adamson v. Parker, et al.* 727.
 3. A coroner in discharging the duties of sheriff, may appoint a deputy; and where a writ is returned "executed, H. J. P. cor. by R. E.," the reasonable inference is, that R. E. was authorised to act for the coroner. *Ibid.*
- See Court, Powers of*, 1, 2.
- See Constitutional Law*, 5.
- See Jury*, 1.
- See Criminal Cases, Proceedings in*, 3.

CORPORATION AND BY-LAWS.

1. A power granted to the corporation of the city of Mobile, "to license bakers, and regulate the weight and price of bread, and prohibit the baking for sale, except by those licensed," is not contrary to the constitution of the State.—*The Mayor and Aldermen of Mobile v. Yuille*. 137.
2. A by-law made pursuant thereto, may be enforced by a reasonable penalty to be judged of by all the circumstances of the case. *Ibid.*
3. A penalty, to be reasonable, must be certain; a penalty, therefore, that the offender shall pay a fine not exceeding fifty dollars, to be recovered before the Mayor, &c. is void for uncertainty. *Ibid.*
4. Whether the penalty of a by-law, which condemns to forfeiture such bread as is of less weight than the ordinance requires and exacts from the baker, as the price of his license, a sum beyond what may be necessary to compensate for issuing and registering it, can be supported.—*Quere. Ibid.*
5. When the charter of a Rail Road Company directs that books of subscription shall be opened, and all persons are admitted to become members of the corporation, by subscribing for stock, the act of subscribing creates a contract with the corporation to pay for the shares subscribed, in the manner provided by the charter: and an action may be maintained to recover instalments called for by the corporation, notwithstanding another remedy may be given by the charter authorizing a sale of the stock, whenever it can be sold at the

CORPORATION AND BY-LAWS—CONTINUED.

- par value. *Beene v. The Cahawba and Marion Rail Road Company.* 660.
6. A corporation may maintain assumpsit upon a contract to take its stock at a specific price. *Ibid.*
 7. So, also, it may declare on a contract to take stock agreeably to the provisions of its charter; and to such a declaration the common counts may be added. *Ibid.*
 8. A declaration by a corporation on a contract to take and pay for stock by instalments, and which also states that the action is brought for the use of another, is not evidence that the stock sued for, has been transferred by the corporation. *Ibid.*
 9. Where the name of a corporation has been changed by an amendatory act, and suit is brought by it in its first name, it is not necessary that the corporation should show the amendatory act has been rejected by its stockholders. *Ibid.*

COURT, CHARGE OF.

1. A charge of a Judge which refers to the jury, the decision of a question of law, is erroneous. *Pharr & Beck v. Bachelor.* 237.
2. In a criminal case, where the charge requested may have been entirely immaterial, and its propriety is not shown by the evidence disclosed, it will be presumed to have been properly refused. In such cases error must be affirmatively shown, and it will not be presumed. *The State v. Schuessler.* 419.
3. It is not error to charge a jury that the orphan's court when regularly applied to, had the right to authorize the sale of the real estate of deceased persons to pay debts, and that a sale made under an order of that court would transmit the title—there being nothing in the record to show its incorrectness, or that the intestate had not at the time of his death, both the legal and equitable estate coupled with the possession. *McKenzie & Currie v. McColl, Judge, &c. use.* 516.
4. A charge upon an abstract point of law, not calculated to mislead the jury, furnishes no ground for the reversal of a judgment. *Magee v. Billingsley.* 680.
5. An error in a single expression contained in a charge to the jury, if explained and corrected, so that the jury could not have been misled by it, will not be fatal to the judgment. *Ibid.*

See Error, Writ of, 19.

COURT, POWERS OF.

1. When the office of sheriff is full, and a temporary inability of the sheriff to act from sickness, the court has no power to direct the coroner to impanel a jury in a criminal case. *The State of Alabama v. Monk.* 415.
2. Whether, in the event of the refusal, or permanent inability of the sheriff to act, the court does not, inherently, possess the power of appointing a ministerial officer to execute its mandates—*Quere.* *Ibid.*

COVENANT.

1. The defendant covenanted to pay to the plaintiff a certain sum of money on a day designated, if the latter would deliver to him possession of the plantation on which he then resided, on a previous day; *provided*, that the defendant might discharge his obligation to pay the money, by permitting the plaintiff to retain the possession of the plantation until the day of payment arrived: *Held*, 1. That the covenant to pay the money was *dependent*, and a delivery of the possession of the plantation, or something equivalent should have been alleged in the declaration. 2. If the obligation to pay was dis-

COVENANT—CONTINUED.

charged by the permission to occupy, the defendant should have shown it, in his defence. *Bailey, use, &c. v. White.* 330.

CRIMINAL CASES, AND PROCEEDINGS IN.

1. Where the defendant pleads not guilty to an indictment, containing three counts, and the entire cause is submitted to a jury who find a verdict as to one count, without responding to the others, the cause is at an end. *The State v. Coleman and Owens.* 14.
2. A grand jury legally constituted of thirteen members, is competent to act, although it may subsequently be reduced, by the absence of one juror, to twelve: and this is also the case, notwithstanding the court, by statute, has the authority to re-constitute the grand jury, on account of the absence or inability to serve, of all or any of the grand jurors. *The State of Alabama v. Miller.* 343.
3. When the office of sheriff is full, and a temporary inability of the sheriff to act, from sickness, the court has no power to direct the coroner to impanel a jury in a criminal case. *The State of Alabama v. Monk.* 415.
4. To support an indictment for putting out an eye of an individual, under the statute of mayhem, it is not necessary where the injury is done in a sudden conflict, that the defendant should have formed the design previous to the conflict; it is sufficient if the defendant maliciously, and on purpose, does the act in pursuance of a design formed during the conflict. *The State v. Simmons.* 497.
5. The penalty provided by law, for keeping a billiard table for play without a license, can only be enforced by a *qui tam* action at the suit of an informer. *The State v. Fillyaw.* 735.

See Indictment, 1.

See Court, Charge of, 2.

CUSTOM.

1. A contract to carry cotton from a landing on the Tennessee river to New-Orleans, at fifty cents per hundred pounds, although in writing, does not preclude the boat owner from showing the existence of a custom on that river, of charging lighterage, in addition to the freight, whenever the tide in the river is so low throughout the season, as to prevent cotton boats from passing the Muscle Shoals. *Andrews, use, &c. v. Roach & Coffey.* 590.

DAMAGES.

1. Damages, as a compensation for the rents and profits, in an action of trespass to try title, can only be computed from the time when the title was cast on the plaintiffs. Heirs at law, therefore, cannot recover damages which accrued previous to the death of their ancestors. *Brewster v. Buckholts, and others.* 20.
2. When Bank bills are at a discount, compared with specie, but the Bank is liable to be compelled to pay them in gold or silver, according to their tenor, the damages, properly accruing on the breach of a contract, of which such Bank bills formed the actual consideration, can not be reduced because of their estimated depreciation. *Bell v. The Real Estate Banking Company of Starkeville, Miss.* 77.
3. In an action of trespass to try titles, the plaintiff may recover damages beyond the sum laid in the writ and declaration. *Bumpass v. Webb.* 109.
4. An agent, in case of a neglect of duty, is liable to nominal damages upon the breach of his contract, and if any loss has been sustained by the principal, in consequence of the neglect, he is liable to the actual loss incurred, but not to

DAMAGES—CONTINUED.

any greater extent. *The Bank of Mobile v. Huggins*, adm'r of Vedder, survivor of Blair & Vedder. 206.

5. The discharge of a solvent party to a note, in consequence of an act of negligence, by the agent, is not an *actual loss*, when there are other solvent parties, who remain bound to the principal; and it rests with the principal to show, before he is entitled to recover the amount of the note as damages, that the parties who remain bound to him, are unable to pay. *Ibid.* 207.
6. When a note is withdrawn by the owner from the bank, where it was deposited for collection, the Bank is not discharged from its liability to damages, if it has omitted to give notice to the principal, of the non-payment. *Ibid.*
7. Damages equal to the statute rate of interest, are recoverable upon a sum of money due for the *use and occupation* of a house, &c. *Cooke v. Farinholt.* 384.

See Ejectment and Trespass to try Title, 2.

See Summary Proceedings, 6.

See Bills of Exchange and Promissory Notes, 9.

DEED, AND REGISTRATION OF.

1. The registry of a deed for land, executed by a person not in possession, or who does not appear from the records to have had any connection with the title, will not operate as a notice to a subsequent purchaser. *Fenno, et al. v. Sayre & Converse.* 458.
2. When the acknowledgment of a deed of trust, conveying personal property to a trustee, for the benefit of certain creditors, is made by the grantor, and the delivery is said to be acknowledged to the *cestui que trust*, instead of the trustee, it is a substantial compliance with the statute, and the deed is properly admitted to record on such an acknowledgment. *Stewart v. Fowler.* 629.

DELIVERY BOND.

1. When slaves have been levied on and discharged by the execution of a forthcoming bond under the statute, and they are not delivered to the sheriff pursuant to the condition of the bond, but that is returned forfeited, and thereupon an execution is issued on it against the principal and surety; upon which the surety delivers the slaves, which are afterwards released by the fiat of the Chancellor, on a bill filed by the wife of the defendant in execution, on proper security; this is no ground to the surety for restraining the plaintiff from making a levy on his property, to satisfy the execution issued on the forthcoming bond. *Jemison v. Cozens.* 636.
2. It is no defence to the surety in a forthcoming bond, that the property levied on does not belong to the principal. *Ibid.*

DEMURRER TO EVIDENCE.

1. Where a party offers no evidence upon a trial before the jury, as a matter of right he may demur to the evidence of his adversary; especially if it is not "loose, indefinite and circumstantial." *Pharr & Beck v. Bachelor.* 237.
2. A demurrer to evidence is sufficient, if after setting out the evidence, it admit every word, figure and statement, and "every conclusion that may be reasonably drawn therefrom to be true," and refers in usual form the questions of law to the court; unless from the peculiarity of the case a demurrer in such form is not adapted to it. *Ibid.*
3. The court may, with propriety, refuse to permit a defendant, who has offered evidence to the jury, to withdraw the same, and demur to that adduced by the plaintiff. *Catlin, Peeples & Co. v. Gilders, ex'r and ex'rx.* 536.

DEPOSITION.

1. Where a commission to take a deposition, directed the commissioners to take the deposition on a certain day, and continue from day to day, until completed, the commissioners are not authorised to meet on the day designated, and adjourn to one more remote than that next succeeding. *Harding v. Merri-
ck & Washington.* 60.
2. An affidavit of the non-residence, &c. of a witness was made five months before a commission issued to take his deposition: *Held*, that his continued non-residence would be presumed, and the affidavit was sufficient. *Pharr
& Beck v. Bachelor.* 237.
3. Under the act of 1839, which allows the oath of the plaintiff to be received in suits upon accounts not exceeding one hundred dollars, the deposition of the plaintiff may be taken, under circumstances that will authorise the taking the deposition of any other witness. *Moore v. Hatfield & Smith.* 442.

EJECTMENT AND TRESPASS TO TRY TITLES.

1. Damages, as a compensation for the rents and profits, in an action of trespass to try title, can only be computed from the time when the title was cast on the plaintiffs. Heirs at law, therefore, cannot recover damages which accrued previous to the death of their ancestors. *Brewster v. Buckholts, and
others.* 20.
2. If one against whom an action is brought to recover the possession of land, would put an end to the suit, and prevent the recovery of damages, for a longer period of occupancy, he should make a disclaimer in open court, or in some other manner, and yield the possession to the plaintiff. *Bumpass v.
Webb.* 109.
3. In an action to recover the possession of land, a verdict and judgment which conclude the matter in controversy, may be aided by the description of the premises in the declaration. *Ibid.*
4. In an action of trespass to try titles, the plaintiff may recover damages beyond the sum laid in the writ and declaration. *Ibid.*

ERROR, AND WRIT OF.

1. When a writ of error is sued out to remove a case from the county to the circuit court, and the record is not filed, but the writ of error is dismissed, and the judgment of the county court affirmed on certificate, the judgment entry must shew affirmatively, every fact necessary to authorise the judgment on certificate. *Foster and others v. Harrison.* 25.
2. When the judgment entry recites that it appeared from the certificate of the clerk of the county court, that one of the defendants to a judgment in that court, prayed for and obtained a writ of error, and executed bond, &c. &c., the legal presumption is, that the writ of error was sued out by one, in the name of both defendants. *Ibid.*
3. The 25th day of December, is not *dies non juridicus*, nor will a writ of error be quashed, because if it was issued on that day. *Starke v. Marshall &
Cammack.* 44.
4. All reasonable intendments are made in favor of the regularity of the proceedings of courts of general jurisdiction; and *Seemle*, that an appellate court will not reverse a judgment *on error*, because at some term previous to the trial, a judgment of non-suit was set aside at defendant's cost, though in such case he might not be remediless. *Bumpass v. Webb.* 109.
5. A recital or memorandum copied into the transcript sent to the appellate court, but which does not appear to have been a part of the record in the inferior court, will not be so regarded on error. *Ice v. Manning.* 121.
6. In a case where property levied on is claimed, and after trial is subjected to the

ERROR, AND WRIT OF.—CONTINUED.

- payment of the execution, by the verdict of a jury, which also assesses damages for the frivolous claim, it is irregular to render judgment against the claimant for the debt, damages, and costs, to be levied on the property subjected; but such a judgment cannot be reversed at the instance of the claimant, because he is not injuriously affected by the irregularity. *Lee v. Bryan*. 278.
7. Although by statute, an execution may issue upon a delivery bond, which is returned "forfeited," yet a writ of error will not lie for the purpose of revising the bond; if too defective to sustain an execution, the defendant may obtain a *supersedeas*, or if the defect be not available at law, in a proper case, he may go into equity. *Taylor, et al. v. Powers, use, &c.* 285.
 8. An order of the circuit court to sell land, levied on by a constable, is not such a final judgment as a writ of error will lie from. *White and Bingham v. Shannon*. 286.
 9. A writ of error will not lie to revise an order quashing an attachment issued under the act of December, 1837, as ancillary to an action pending at law: and though the plaintiff recovers a judgment in the principal case, and sues out a writ of error to review it, the court will not examine the order on the attachment. *Semble*, in such case, the plaintiff's remedy, if injured, is by *mandamus*. *Eslava v. Rigeaud*. 363.
 10. The want of a formal issue cannot be objected to, on error, when the record shows that the parties appeared and submitted their cause to a jury. *Clark's adm'rs vs. Stoddard, Miller & Co.* 366.
 11. When the verdict and judgment against an administrator are in the usual form, and issues appear on the pleas of non-assumpsit and the statute of limitations, it is not error that the verdict does not show the amount of assets, although the plea of *plene administravit* is also pleaded, but no issue of fact on it framed to the jury, and the plea being disposed of on demurrer to the replication. *Sanford, adm'r v. Wicks*. 369.
 12. Where an attachment is sued out under the act of 1837, as ancillary to an action at law, the irregularity of the attachment or proceedings on it, will not authorise the reversal of the judgment in the action. *Dansby v. Johnson, use of Gresham*. 390.
 13. And where, in such case, the record contained the entry of a judgment in favor of the plaintiff, it will be considered as having been rendered in the suit, and not on the assistant process. *Ibid*.
 14. It can not be objected, on error, that no issue has been tried, when the record shows that an issue was submitted to the jury, although no plea appears in the record. *Bethea v. McCall, pro ami*. 449.
 15. The prosecution of a writ of error from a decree of the chancellor, dismissing a bill, by which a judgment at law had been enjoined, does not reinstate the injunction and supersede the issuance of an execution, on the judgment at law, although a bond be given with sureties for the prosecution of such writ of error in double the amount of the judgment at law. *Boren, et al v. Chisholm*. 513.
 16. If in an action on a promissory note, the jury return a verdict for an amount beyond what appears from the declaration to be due, the defendant, instead of prosecuting a writ of error, should seek its correction, by asking a new trial. *McKenzie & Currie v. McColl, Judge, &c. use*. 516.
 17. When a verdict is found, the correctness of its amount can not be inquired into upon a writ of error. *Moore v. Bradford*. 550.
 18. When the plaintiff's demurrer to several pleas of the defendant is overruled

ERROR, AND WRIT OF—CONTINUED.

- generally, with leave to reply, which is declined, the judgment on demurrer will not be reversed if either of the pleas is good. *Puckett v. Pope*. 552.
19. A judgment will not be reversed, though the court may have erred in its charge, if upon the entire record it is obvious the plaintiff never can recover. *Caruthers & Kinkle v. Mardis' adm'rs.* 599.
 20. No advantage can be taken on error because the damages found by the verdict and judgment exceed the amount of the note and interest, as described in the declaration. *Abney v. Carter*. 715.
 21. Where a motion was made for a new trial at the term at which the judgment was rendered, but the court adjourned without disposing of it, the refusal of the Judge at the next term, to hear the motion and decide it on its merits, will not authorise a reversal of the judgment in the cause. *A man. Jamus* is the appropriate remedy to compel a court to entertain and decide upon a matter within its discretion. *Bridges & Beers v. Miller*. 746.
- See Practice in Chancery*, 5, 8.
See Practice at Law, 8, 9, 16.
See Contempt, 1.
See Mortgage, 1.
See Bonds, 5.
See Execution, writ of, 26.
See Court, charge of, 4, 5.
See Forcible Entry and Detainer, 7.

ESTATES OF DECEASED PERSONS.

1. A presentment of a claim against an estate, within the time required by law, to the executor or administrator, is sufficient, without establishing at that time, its justice. *Jones v. Pharr*. 283.
 2. A petition under the act of 1822, by an executor or administrator, for an order to sell the real estate of his testator, or intestate should particularly state which of the heirs are of age, and which are infants, or *femes covert*. The heirs of *Griffin v. Griffin's ex'r.* 623.
- See Executors and Administrators*, 1.
See Pleading, 30.
See Orphans' Court, 2.

EVIDENCE.

1. It is no objection to a witness that he married the widow of a co-executor of the claimant, on a trial of right of property, unless it be shown that her former husband wasted the estate of his testator, and that the witness obtained by the marriage, an estate chargeable with such devastavit. *Harrell v. Floyd and wife*. 16.
2. Testimony, which is relevant, cannot be rejected because unaided by other proof, it will not make out the case. The effect of testimony can only be ascertained by a motion to instruct the jury. *Ibid.*
3. The plaintiff recovered a judgment at law against the defendant, to restrain the collection of which, an injunction was awarded at the instance of the latter, and the usual bond executed; the injunction being dissolved, the defendant's land was sold under a *feri facias*, and the plaintiff became the purchaser thereof; an action being brought to recover the possession, on the trial the plaintiff offered in evidence, the record of the case, in which the judgment had been recovered: *Held*, that the evidence was admissible, notwithstanding it was objected, that the deed from the sheriff, the decree dissolving the injunction, and the injunction bond were not produced. *Bumpass v. Webb*. 109.

EVIDENCE—CONTINUED.

4. Where the claimant on the trial of the right of property, before a justice of the peace, appeals to the circuit court, the constable should deliver to him the property, and if instead of doing this, he sells it under a bond of indemnity from the plaintiff in execution, the bond is void, as the consideration requires the doing of that which is against law. The constable and plaintiff are joint trespassers, but as a verdict for the latter, on the trial of the appeal, would not be evidence in an action by the claimant against the constable, the constable is a competent witness for the plaintiff. *Murray, adm'r v. Ezell.* 148.
5. Where a case, of the trial of the right of property, is removed from a justice of the peace to the county or circuit court, on the trial of the appeal, the execution is admissible evidence, without producing the judgment. *Ibid.*
6. *Semble*, parol evidence is admissible to give direction to and apply a written instrument, but not to add to, or vary its terms. *McLendon v. Godfrey.* 181.
7. Impertinent matter, foreign to the cause, need not be proved; but *Semble*, an immaterial averment must be proved, where the subject of it is a record, a written instrument, or perhaps an express contract, otherwise, there might be a variance between the pleading and the proof. *Pharr & Beck v. Bachelor.* 237.
8. Where the declaration alleges, that the plaintiff was prevented from performing his part of the agreement, either by the refusal of the defendant to permit him, or by some act or omission on his part, such an allegation is not sustained by proof, that the contract was rescinded by mutual consent, and the defendant agreed to pay the plaintiff for his services, &c.; but the modified contract should be declared on. *Ibid.*
9. The mere fact, that certain persons valued property, the subject of the contract, will not make their *written* valuation, evidence, unless it was authorised to be made, or assented to, by the parties. *Ibid.*
10. Where the instrument sued on is executed by one, who professes to be an agent, the plaintiff is not required, under our statute, to prove the authority of the agent, unless that fact is put in issue by a plea, verified by affidavit.—The statute applies as well to corporations as to individuals. *The Trustees of the Gainesville Female Academy v. Brown.* 326.
11. The statute, making the instrument itself, unless questioned by plea, evidence of the debt or duty for which it was given, there was no necessity on the part of the plaintiff, in the absence of such plea, to prove the consideration, or that the contract was within the scope of the legitimate objects of the corporation. *Ibid.*
12. The plaintiff claimed the slaves in question under a bill of sale which his wife's father had executed and delivered to her, previous to her marriage: the defendant claimed the slaves under the will of the father; under the plea of the statute of limitations—*Held*, that it was allowable for the defendant to show the nature of the father's *possession*, and that it was *adverse* to the claim set up by the plaintiff. *Williams v. Haney.* 371.
13. And in such case, the will under which the defendant claims, was admissible evidence for the purpose of connecting her with the testator's possession. *Ibid.*
14. Evidence is admissible which is pertinent to the issue, and which either alone, or in connection with something else serves to elucidate the matters controverted, if the source from which it comes is unexceptionable. *Ibid.*
15. The certificate of the officers selecting grand juries, under the act of 1836, is a record which cannot be impeached by evidence showing that it was not

EVIDENCE—CONTINUED.

- signed by the clerk whose name appears to it; or by showing that he was not present when the duties were performed. *The State v. Clarkson*. 378.
16. If such certificates shows that the grand jurors were drawn by lot, this is proper evidence to support an issue that the grand jurors were drawn by lot, instead of being selected, as provided for by the act of 1836. *Ibid*.
 17. An indictment found among the files of the Court, and recognized as an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the same indictment; and on such an issue no evidence need be produced to sustain the affirmative. *Ibid*.
 18. One not a physician, can not be called on as a witness, to express his opinion of the value of medical services rendered to a sick person. Nor will it make any difference, that a competent witness had previously, in his hearing, expressed his opinion of the value of the services rendered. *Mock v. Kelly*. 387.
 19. The terms "in due form," as used in the act of Congress of May, 1790, which provides for the authentication of the records and judicial proceedings of the courts of a sister State, merely mean that the attestation of the clerk shall be according to the form prescribed for the Court where the proceedings were had; and the certificate of the presiding judge is made the only evidence that such form has been observed. *McRae v. Stokes and Smith*. 401.
 20. In the attestation of the clerk it was affirmed, that the records of another court lately existing in the town in which his court was holden, (and in which late court the judgment was rendered,) had by law been there transferred; the presiding judge certifying that the attestation was "in due form," it was *held*, that the transcript was sufficiently authenticated, without the production of the law by which the transfer was made. *Ibid*.
 21. Proof that a deed for land was made in 1824, by the defendant to the plaintiff, and given to the mother of the plaintiff, an infant, for safe keeping, who ten years afterwards, was married to the defendant, and that notice had been given to the attorney of the defendant to produce the deed. On the trial—*Held*, sufficient to authorise proof of the contents of the deed, by secondary evidence. *Bethca v. McCall, pro. ami*. 449.
 22. Proof by the subscribing witness to a deed, that he subscribed in 1824, as a witness, a deed of gift for lands made by the defendant to the plaintiff—that the land was described in the deed by its proper designation as part of the public lands, but he was then unable to say, from his recollection of the contents of the deed, what it was—that the defendant, at the time of making the deed, stated that the lands conveyed were those on which Daniel McCall had resided, and by another witness, that the land on which McCall resided was that sued for—*Held*, competent evidence in an action against the grantor—no question being raised on the trial as to its sufficiency. *Ibid*.
 23. When the facts of a case show that a witness stands in such a relation to the parties to a suit, that he will be liable precisely to the same extent to the unsuccessful party, his interest is balanced and he is therefore competent. *Hallet & Walker, ex'rs, &c. v. O'Brien*. 455.
 24. The plaintiff, to prove his demand for work and labor, introduced a witness, who is the person by whose direction the work is done; it appeared that the witness was himself under contract to do the same work for the defendant's testator. The interest of the witness is balanced because he is liable to the unsuccessful party, whichever it may be—to the plaintiff for the work done—to the defendants for his failure to perform his contract with testator. *Ibid*.

EVIDENCE—CONTINUED.

25. Under the act of 1837, which permits plaintiffs to prove their demands when the suit is on an account for less than one hundred dollars, the defendant is not allowed to prove an offset arising out of an account, although it is within that sum. *Bennet v. Armstead*, for the use of *Hair*. 507.
26. Where, from an inspection of a promissory note, it is doubtful whether the party making it, acted for himself or as the agent of another, parol evidence is admissible to remove the doubt, and show the character of the transaction. *Deshler v. Hodges*, use, &c. 509.
27. The declaration described a judgment recovered at ——— in the county of Richmond, in the State of New-York, by and before the supreme court of judicature for said county and State; the exemplification produced, was a judgment rendered by the supreme court of judicature of the people of the State of New-York, at the city of Albany—*Held*, that the record offered in evidence, was not admissible under the plea of *nul tiel record*. *Pearsall v. Phelps*. 525.
28. The exemplification of a record from the State of Georgia, in these words—“Georgia, Greene county court of Ordinary, 30th September, 1803. The within will and testament of John Finlay, dec'd, proven in open court, by the oaths of James Wood and John Wood, subscribing witnesses to the same, who declared, they saw the same signed and acknowledged by him, the said John Finlay, in his proper senses, and saw E. Park and John Buckner subscribe their names as witnesses with themselves. Thomas Carleton, clerk. Recorded, 30th September. Thomas Carleton, clerk,”—accompanied by a certificate, in proper form, by a succeeding clerk, that the above, together with a copy of the will, was a true copy of the last will and testament of John Finlay, from the records of his office; and also, by a certificate of the chairman of the court, that he was clerk—and his certificate in due form—*Held*, that the transcript was properly authenticated, and that the record showed that the will had been admitted to probate in the State of Georgia, and admissible in evidence in the courts of this State. *Lee v. Hamilton*, administrator. 529.
29. Admissions of a party, are evidence against himself, but will not authorise the introduction of proof of counter declarations, made at a different time. *Ibid*.
30. Where a contract, made with an agent, is sought to be enforced by the principal, or his assignee, and its validity is questioned, on the ground of fraud, the agent may be called as a witness, to prove what were his declarations at the time the contract was made, without showing any proof of the nature or extent of his authority. *Harrison v. Tulane, et al.* 534.
31. Where, in an action on a promissory note, the defendant, by his plea, puts in issue the making of the note, if it is correctly described in the declaration, it should be permitted to be read to the jury, without any additional evidence, that the plaintiff may offer proof of its genuineness, and to show that it is the defendant's act. *Catlin, Peeples & Co. v. Gilders, ex'r & ex'rx*. 536.
32. One of the partners of a firm, when sued upon a promissory note made in the name of the concern, after its dissolution, by another of the late partners, can not, for the purpose of showing that it was not made by his authority, give evidence of what he had said in regard to other notes, made under similar circumstances. *Ibid*.
33. It is competent for partners, upon the dissolution of their partnership, to invest each other, or any one of their number, with authority to borrow money, and make notes upon their joint account, in order to pay the debts of the

EVIDENCE—CONTINUED.

- firm; and where such an authority is conferred, the statement of one of them, upon obtaining a loan of money, that it was to be applied in payment of a firm debt, is evidence against the others. *Ibid.*
34. It is not necessary, to entitle the plaintiff to recover, that the proof in his favor should be conclusive; but if the evidence establishes *prima facie*, a good cause of action, it is quite sufficient. *Ibid.*
35. Under the common count, upon an account stated, a promissory note is admissible evidence, without any proof of its consideration. *Ibid.*
36. Upon the trial of an issue whether the defendant was administratrix at the time the suit was commenced, the record of the county court showing the time of the appointment, is evidence of a higher grade than the statement of the time of her appointment, in the bond executed by her as administratrix.—*Elliott, adm'x v. Eslava.* 568.
37. Where documentary proof is offered for the purpose of discrediting a witness, its relevancy should be made apparent, or it may be rejected. *Kennedy's ex'rs v. Geddes & Co.* 581.
38. Where a bill presented to a drawee for acceptance, was at his request, left with him, a notice to his executors, after his death, to produce it on the trial of an action against them, for the refusal of their testator to accept, will authorize the admission of parol evidence of its contents, although they deny it ever came to their possession. *Ibid.*
39. A grantor who has a resulting trust in the property conveyed, is not a competent witness for his grantee, in an action of trespass, although he is introduced only to prove the consideration of the deed. *Stewart v. Fowler.* 629.
40. The entries made by a tradesman, in his book of accounts, are not admissible in his favor, although it is shown by the testimony of other witnesses that his books were correctly and accurately kept. *Nolley v. Holmes.* 642.
41. Evidence which does not tend to establish any material fact, is inadmissible. *Magee v. Billingsley.* 680.
42. Proof that a judgment was rendered in a suit by B, against the executor of P, and that the note on which the suit was founded, was executed by P, and that the record had been destroyed by fire, is not sufficient evidence to prove the identity of the note in a suit in chancery, in which the judgment was not evidence of the original debt. 1st, because the note itself was not produced, nor its absence sufficiently accounted for by proof of the destruction of the record; the note not being a necessary part of the papers of the cause. 2d, because there was no proof of the identity of the note when made, to whom, and by whom made, for what amount, and when payable, without reference to the judgment, which was not evidence for any purpose, and could only have been looked to to refresh the memory of the witness. *Borland v. Phillips, et al.* 718.
43. An admission made for the purpose of effecting an amicable settlement of a matter in dispute, is inadmissible against the party making it. *Wood v. Wood, et al.* 756.

See Bond, 1.

See Chancery, 26, 33, 34.

See Contract, 6.

See Corporation and By-Laws, 8, 9.

See Deposition, 3.

See Executors and Administrators, 14.

See Partners and Partnership, 3.

See Practice in Chancery, 10.

See Witness, 2.

EXECUTION, WRIT OF.

1. The quashing of a writ of *fiery facias*, after it has been executed, does not necessarily avoid all proceedings, which have been had under it. *Bumpass v. Webb*. 109.
2. A party may take out a second execution before the return of the first, at his own cost. *Fryer, adm'r v. Dennis*. 254.
3. An *alias* execution cannot issue after the death of the defendant in execution, without a revival of the judgment, unless such *alias* is issued to continue a lien acquired by a former execution, issued in the life-time of the defendant. *Ibid*.
4. If the replevy bond executed on the levy of the attachment, can not, on being returned forfeited, have the effect of a judgment, an execution issued thereupon will be superseded, or enjoined, according as the objection may be. *Dansby v. Johnson, use of Gresham*. 390.
5. The issuance of an execution, is an act purely ministerial, and may therefore be delegated. *Kyle v. Evans, et als*. 481.
6. A justice of the peace, in the issuance of an execution, acts ministerially and not judicially, and may therefore, delegate that power to another: and it is not necessary that such delegation should be in writing. *Ibid*.
7. Property levied on may be sold after the return day of the execution, by the consent of the defendant, without a *venditioni exponas*. *Pickard, et als. v. Peters, use, &c.* 493.
8. When property is levied on as belonging to the principal, and is claimed by another, the plaintiff may lawfully proceed to have satisfaction, by causing another levy to be made on the property of the surety, and this right is declared by statute. *Jemison v. Cozens*. 636.
9. Where an execution is unauthorised by the judgment, a *supersedeas* is the proper remedy, or when the court, from which it is issued, is in session, a motion to quash will be entertained. *Crenshaw, guardian, &c. v. Hardy*. 653.
9. No execution can issue against the sureties of an executor or administrator, until the return of an execution unsatisfied, against the principal in the administration bond. *Watkins v. Bassett and wife*. 707.
10. If such execution issues improperly, it may be quashed, but no writ of error can be prosecuted to reverse it. *Ibid*.

See Garnishee, 7, 8.

See Judgment and Decree, 14.

See Lien, 5, 6, 7.

See Sheriff and Sureties, 1.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator may report an estate insolvent when the *personal* property is insufficient to pay all the debts; and the effect of such representation, duly certified from the County Court, will be to abate all suits then pending. *Woods v. McCann and Witherspoon, adm'rs*. 61.
2. A presentment of a claim against an estate, within the time required by law, to the executor or administrator, is sufficient, without establishing at that time, its justice. *Jones v. Pharr*. 283.
3. A proceeding against a constable, by motion, for failing to make money upon an execution, when he could have done so by the use of due diligence, can not, after the death of the constable, pending the motion, be revived against the administrator, because the revival of the suit is not provided for by statute. *Logan, adm'r v. Barclay*. 361.
4. The voluntary appearance of an administrator, and consent to become a

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- party to the suit, is an admission of record that his intestate was served with process. *Clark's admr's v. Stoddard, Miller & Co.* 366.
5. The functions of an executor do not necessarily cease with the final settlement of the estate, either with the Orphans' court, or with the devisees or distributees. *Norman v. Norman*, 389.
 6. An administrator may plead the insolvency of the estate committed to his charge, in abatement of a suit by *capias*, in the life-time of the intestate, in which an attachment also was sued out as an auxilliary process, and levied on real and personal estate. And the lien of such attachment is only an inchoate right dependent on the judgment, which not being allowed, the lien is gone. *Hale, adm'r v. Cummings & Spyker*. 398.
 7. Fraud, in a sale made by an administrator of his intestate's effects, is a valid defence to the contract, when attempted to be enforced by an administrator *de bonis non* of the estate. *Rice & Moore v. Richardson & Keith, admr's*. 428.
 8. The resignation of an executor or administrator will not abate a suit then pending. If there be more than one, the suit will proceed in the name of or against those remaining; if he is the sole representative of the estate the suit will be revived in the name of his successor. *Elliott, adm'r v. Es-lava*. 568.
 9. An executor or administrator of an executor or administrator, cannot be sued at law, for the devastatit of the former executor or administrator; in such a case, resort must be had to a court of chancery. *Taliferro, adm'r de bonis non* of *Polly Thompson v. John Y. Bassett and wife, &c.* 670.
 10. Whether the sureties of an executor, are liable for assets remaining in specie, at his death, unadministered, and which pass into the hands of succeeding representatives of the estate.—*Quere. Ibid.*
 11. When a judgment is improperly rendered against an administrator, the statute judgment consequent on a return of an execution not satisfied, is void also. *Watkins v. Bassett and wife, &c.* 707.
 12. Where an executor purchases part of the testator's estate, he is, after the expiration of the term of credit, chargeable with the amount as cash. *Childress v. Childress*. 752.
 13. The executor purchased from the United States, paid for and received the evidence of title for a tract of land; afterwards he sold to the testator a moiety, who paid the money, but received no written evidence of his purchase; the testator in his lifetime, relinquished his right to the executor for a valuable consideration without writing. *Held*, that the executor was not bound to account for the land as a part of the testator's estate. *Wood v. Wood, et al.* 756.
 14. *Semble*—executors as to whom a bill in chancery is dismissed, are competent witnesses for a co-executor, as against whom the bill is prosecuted, where it appears independently of their testimony, that they are not responsible to the complainant or their co-executors. *Ibid.*

See Error, and Writ of, 11.

See Evidence, 36.

See Execution, Writ of, 10.

See Mortgage, 3, 4, 5.

See Orphans' Court, 3, 6.

See Pleading, 25, 26.

See Process, 4.

See Scire Facias, 4.

See Statute of Limitations, 4.

FERRY AND FERRYMAN.

1. A public ferryman who, according to the statute of this State, has given bond, is a common carrier. *Babcock & Beene v. Herbert.* 392.
2. A license to keep a public ferry, on a navigable river, does not authorise the grantee of the ferry to place any obstruction across the stream on which the ferry is situated; and therefore, where a rope was stretched across a river to pull the ferry boat over, the owner of the ferry was held responsible for an injury arising from that cause. *Ibid.*

FORCIBLE ENTRY AND DETAINER, &c.

1. A Justice of Peace has the power to supply the loss of any paper relating to a cause pending before him. *Cunningham v. Green.* 127.
2. A complaint in a suit for a forcible entry, is not insufficient, because it seeks to recover a messuage, with the appurtenances, known as the south half of section twenty. Such a description of the land is ample; and the judgment, if a recovery is had, may be to recover the half section, as that is the name by which the messuage is known. *Ibid.*
3. An allegation of seizin in fee in the plaintiff, and an assertion that the defendant entered and disseized, and put out the plaintiff from the peaceable possession of the lands described, is a sufficient averment of possession. *Ibid.*
4. The defendant in an action for a forcible entry, can not introduce evidence to shew that the land in controversy is a part of the public domain, for the purpose of contradicting the allegation of the plaintiff that he is seized in fee. *Ibid.*
5. Nor is such evidence admissible to show that the plaintiff was not in possession at the time of the entry. The fact, if admitted, has a tendency to elucidate the question as to the possession, which is alone in issue. *Ibid.*
6. A Judge of the county court has no authority to award a writ of certiorari, returnable into the circuit court, in a suit for a forcible entry and detainer. *Corner v. Corner.* 524.
7. A justice of the peace may permit an amendment to the complaint in a case of forcible entry and detainer, before issue joined. *Murry v. Harper.* 744.
8. When the circuit court affirms the judgment of a justice of the peace, in a case of forcible entry and detainer, it is not error for the court to remand the case, to enable the justice to issue a writ of restitution. *Ibid.*

FRAUD.

1. A plea averring that the note in suit was given for an interest in two lots in the town of Dadeville—that the lots were in the first instance purchased by one W, the condition of the sale to him, being that the title was not to be made until the payment of the purchase money—that W died without making full payment: that with a knowledge of these facts, the plaintiff fraudulently sold the lots to the defendant, and can not make, or obtain to be made, a title therefor; and that the defendant has not now, and never had, possession of the lots: *Held*, to be bad. 1, because a plea alleging fraud, must show in what the fraud consists; and the facts stated in the plea are no evidence of a fraudulent intention. 2, when the contract is still subsisting, it is no defence to an action for the purchase money that the defendant is not in possession of the land. 3, while the contract remains in force, it is no defence to an action at law, for the purchase money, that the vendor can not make a title, as he is responsible on his covenant for failing to make title. *Clay, et al. v. Dennis, use &c.* 375.
2. Fraud, in a sale made by an administrator of his intestate's effects, is a valid defence to the contract, when attempted to be enforced by an administrator

FRAUD—CONTINUED.

de bonis non of the estate. Rice & Moore v. Richardson & Keith, adm'rs. 428.

See *Chancery*, 14, 15, 24.

See *Vendor and Vendee*, 4, 5.

GAMING.

1. Where money is wagered and deposited in the hands of a stake-holder, it may be arrested by either party before it is paid over, by a notice not to pay it. In such a case, however, a special demand would be necessary to enable him who gave the notice, to maintain an action for the sum deposited by him. *Shackleford v. Ward*. 37.
2. But if the stake-holder, after being so notified by one of the parties, pays the money to the other, he thereby waives the special demand, and may be sued as soon as the plaintiff elects to consider the wager as void; or as soon as it is ascertained that in point of fact, the wager was neither lost nor won. *Ibid*.
3. Where a conveyance of land was induced by money lost at gaming, and also cash paid, although the contract is void, yet equity and moral justice require that the purchaser should be reimbursed the cash paid, before his title will be divested in favor of a prior incumbrancer who was not in possession and whose mortgage was not registered. *Fenno, et al. v. Sayre & Converse*. 458.

See *Vendor and Vendee*, 7.

See *Practice in Chancery*, 10.

GARNISHEE.

1. It is no defence to a suit on a note, that one of the defendants had been garnished by a creditor of the payee, and judgment obtained against him, without proving, also, that the judgment had been satisfied. *Cook, adm'r v. Field, et al.* 53.
2. Such proof may be made in the action of assumpsit under the general issue.—*Ibid*.
3. A debt in suit, may under the attachment law of this State, be attached at the suit of a creditor of the plaintiff, in the same court, where the suit is pending. *Hitt v. Lacey*. 104.
4. Where the defendant pleaded *puis darrien' continuance*, that since the commencement of the suit, the debt sued for, had been attached in the same court, and that judgment had been obtained against him as garnishee, which he had satisfied; on demurrer, the plea was held good, but that the plaintiff was entitled to his costs up to the time of plea pleaded. *Ibid*.
5. No judgment can be rendered against a garnishee, on his answer, until judgment is obtained against the defendant in attachment. *Gaines v. Beirne & McMahon* 114.
6. The statute contemplates the *viva voce* examination of the garnishee, in open court; and although this may be dispensed with, and the answer received in writing, it is no part of the record, unless made so by bill of exceptions, or incorporated into the judgment by a recital of its substance: when, therefore, the clerk sent up a writing, purporting to be the answer of the garnishee, which varied from the recital of the answer in the judgment, it was disregarded. *Ibid*.
7. Where an execution is returned, satisfied, the judgment is discharged; and if garnishee process is afterwards issued against a debtor of the defendant in execution, it will be quashed, on producing the execution returned satisfied. *Thompson v. Wallace*. 132.

GARNISHEE—CONTINUED.

8. Where an execution has been levied, and the plaintiff is satisfied, by payment received through a stranger, who lends the money to the defendant in execution, the judgment can not afterwards be the foundation of garnishee process. *Ibid.*
9. An attorney who has money belonging to a defendant in execution, is subject to be garnisheed, although the money in his hands has been collected by suit. *Mann v. Buford.* 312.
10. When the answer of a garnishee states facts, from which an indebtedness to the defendant in the execution must be inferred, and that for a specific sum, a judgment may be rendered against him, although his answer contains no distinct admission of indebtedness. *Ibid.*

See Practice at Law, 12.

GIFT.

1. *Semble*, the declarations of a father made simultaneously with the execution of a deed of gift to a daughter, that the deed was his will; it would save him the trouble of making a will; he was to enjoy the property during his life, &c.—when coupled with the fact, that he was an habitual drunkard, of but ordinary understanding; and that the deed divested him of the present right of possession of all his estate, both real and personal, satisfactorily show, that he was ignorant of the legal effect of what he did, and that he supposed he was executing a testamentary paper. And a deed executed under such circumstances, may be set aside, on the ground of surprise. *Gibson, et al. v. Carson's adm'r.* 421.
2. *Semble*, the wife acquires no right, *by marriage*, to the property of the husband, and can not maintain a bill in equity, to set aside a deed of gift executed by him previous to the marriage, on the ground that he continued in possession, and she married him under the impression that the property was his. *Ibid.*

GRAND JURY.

1. A grand jury legally constituted of thirteen members, is competent to act, although it may subsequently be reduced, by the absence of one juror, to twelve: and this is also the case, notwithstanding the court, by statute, has the authority to re-constitute the grand jury, on account of the absence or inability to serve, of all or any of the grand jurors. *The State of Alabama v. Miller.* 343.
2. The certificate of the officers selecting grand juries, under the act of 1836, is a record which cannot be impeached by evidence showing that it was not signed by the clerk whose name appears to it; or by showing that he was not present when the duties were performed. *The State v. Clarkson.* 378.
3. An indictment found among the files of the court, and recognized as an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the same indictment; and on such an issue no evidence need be produced to sustain the affirmative. *Ibid.*

GUARDIAN AND WARD.

1. Upon the settlement, by the orphans' court, of the accounts of the guardian of a female ward who has married, the decree should be rendered in favor of the ward and her husband jointly. *Crenshaw, guardian, &c. v. Hardy.* 653.
2. The father, as the guardian by nature, is entitled to the direction and control of the person and property of his child until it attains the age of twenty-one years, subject to the right of chancery under some circumstances to place the child under the pupillage of another. *Wood v. Wood, et al.* 756.

HUSBAND AND WIFE.

1. *Seemle*, the wife acquires no right, *by marriage*, to the property of the husband, and can not maintain a bill in equity, to set aside a deed of gift executed by him previous to the marriage, on the ground that he continued in possession, and she married him under the impression that the property was his. *Gibson, et al. v. Carson's adm'r.* 421.
2. Where the separate estate of the wife is levied on to pay a debt of the husband, in default of any other remedy, a sale may be stayed by injunction.—*Calhoun, by her next friend, v. Cozens, et al.* 498.
3. A married woman, whose husband has abjured the State, and who since that event has traded as a *feme sole*, and taken notes in her own name, may sue for and recover the amount. *Arthur & Corprew v. Brodnax.* 557.

INDICTMENT.

1. An indictment for playing at cards in a store-house where spirituous liquors are retailed, must allege such to have been the character of the store-house when the playing took place; and it is not enough to aver, that spirituous liquors were retailed there when the indictment was found—the playing being charged on a previous day. *The State v. Coleman and Owens.* 14.
2. An indictment, charging the defendant with selling spirituous liquors, to wit: rum, brandy, whiskey and gin, in less quantities than one quart, without having first obtained a license, is good. *The State v. Whitted.* 102.
3. An indictment found among the files of the court, and recognized as an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the same indictment; and on such an issue no evidence need be produced to sustain the affirmative. *The State v. Clarkson.* 378.
4. The charge on an affidavit before a justice of the peace that M. H. and P. D. W., took and *feloniously carried away* a certain hog, is in legal import, a charge of larceny, and may be alleged, in an indictment for perjury, as charging and intending to charge that the hog was *feloniously taken, stolen* and carried away. *The State v. Lea.* 602.
5. When the affidavit upon the charge of perjury as founded, merely states the belief of the affiant, that a larceny has been committed, the assignment of the perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged had not committed the larceny; it is necessary, when the defendant only states his belief, to aver that the fact was otherwise, and that the defendant knew the contrary of what he swore. *Ibid.*

INDORSEMENT.

1. On a contract for the sale of some slaves by S to G, the latter transferred to S, by endorsing his name thereon in blank, a note made by one R to J, but which had never been assigned by him to G. A suit being brought against G on his assignment, in the name of J, for the use of S—*Held*, First, that an irregular assignment like this, which did not convey the legal title, was not embraced by the statute of 1828, defining the liability of endorsers. Second.—That the liability created by the assignment was, that the assignor would pay the debt, if by the use of proper diligence it could not be obtained from the maker of the note. Third.—That what would constitute proper diligence, was a question of fact for the jury, under all the circumstances of the case, and that suit must be brought to the first term of the court to which it could be brought after the maturity of the note, unless some valid reason, such as the insolvency of the party, &c. excused it. *Jordan, use, &c. v. Garnett.* 610.

INDORSEMENT—CONTINUED.

2. The transfer of a note by the assignment of the payee jointly with one who is a stranger to the note, does not convey the legal title, and therefore, not within the statute of 1828, to define the liability of endorsers, but is an affirmation or warranty that the note may be collected of the maker by due diligence. What would constitute such diligence, would be a question of fact, under all the circumstances of the case, for the jury. *Hall v. Chilton & McCampbell*. 633.
3. A declaration on such an assignment in a suit against the assignors, which averred that when the note became due and payable, diligent search and inquiry was made after the maker in the county and State, which was his ordinary place of residence, to present the note for payment, but that he could not be found, and that his place of residence was unknown to the plaintiffs, and that suit was commenced against him to the first court to which he could be sued, but that he could not be found—held sufficient. *Ibid*.
4. A blank endorsement imports a consideration, and can be given in evidence on the common counts. *Milton v. DeYampert*. 648.
5. When one places his name in blank upon the back of a note, negotiable and payable in Bank, although the note is not endorsed by the payee, the endorser thereby becomes bound to a similar extent as he would be by a perfect endorsement to another party to a note; and he may be charged by the payee, upon showing a demand upon the maker, and notice to the endorser, on the last day of grace. *Ibid*.

See Action, 4.

See Bills of Exchange, 8.

INDORSER AND INDORSEE.

See Indorsement, 2, 3, 5.

INSOLVENT DEBTORS.

1. The notice published in a newspaper, that a debtor would appear at a place designated, "on *Saturday*, the 28th July next," and render a schedule of his property as an insolvent debtor, when in fact the 28th of July was Friday, held sufficient. *Briggs v. Hobson*. 404.
2. The condition of a bond to take the benefit of the act for the relief of insolvent debtors, is not forfeited because the justice of the peace will not permit the debtor to take the oath, or render the schedule required by law, if the creditors have been duly notified of the intended application. *Ibid*.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. A writ issued against two, but was executed on one only; the judgment entry recites that the parties came by attorneys, "and the defendant withdraws his plea," and a judgment was rendered against the *defendant*, without designating him by name: *Held*, that it must be considered as a judgment against the defendant only, who was served with process. *Ice v. Manning*. 121.
2. In the condition of a bond, executed to remove by appeal, a case of the trial of the right of property, from a justice of the peace to the circuit court, it was recited that sundry executions had been levied on the property in question—*Held*, that it could not be intended, that the cases had been consolidated by the justice, but the reasonable inference was, only one had been tried, or appealed from. *Murray, adm'r v. Ezell*. 148.
3. Where the record recites, that it satisfactorily appeared to the court the original entry was irregular, through mistake, &c. it will be intended that the

INTENDMENTS AND LEGAL PRESUMPTION—CONTINUED.

court was satisfied of the mistake, by legal proof. *Allen and Dean v. Bradford and Shotwell*. 281.

6. Upon the margin of the judgment entry, the suit was stated against the defendants in the firm name; the process had been served on one of the defendants, and he only pleaded; the judgment recites that the parties came by their attorneys, and the jury were empannelled to try the issue joined—*Held*, that the reasonable inference is, that they only appeared who were parties to the issue tried. *Catlin, Peeples & Co. v. Gilders, ex'r and ex'rx*. 536.
7. Where there are two defendants, only one of whom is served with process, and pleads, and the judgment entry recites that the parties came by their attorneys, and thereupon came a jury, &c. it will be intended that they only came who had made up an issue to be tried by jury. *Puckett v. Pope*. 552.
8. The filing of a plea is an admission that a declaration was filed, although it may not appear in the record. *Arthur & Corprew v. Broadnax*. 557.
9. Where the judgment recites, that there came a jury of good and lawful men, to wit, — and eleven others, it will be intended that the case was tried by a competent jury. *Ellis v. Dunn, Taylor & Co*. 632.
10. If the jury return a verdict in favor of the plaintiff for a specific sum, and the judgment is, that the plaintiff "recover of said defendant the said sum of — dollars, so assessed as aforesaid," &c. the legal conclusion is, that the judgment is for the amount of the verdict. *Ibid*.
11. Where there are several plaintiffs, and the jury find for the "plaintiff," the verdict will be regarded as a finding of the issue in favor of the "plaintiffs." *Ibid*.

See Coroner, 2, 3.

See Error, and Writ of, 12, 13, 14.

See Pleading, 31.

See Process, 5, 6.

See Sale of Chattels, 6.

See Verdict, 2.

JUDGMENT AND DECREE.

1. The record contained an order of publication, by the orphan's court, requiring the executor to settle, on a day designated, the accounts of his testator's estate. On the day appointed, a decree was rendered, reciting that a final settlement was made, and ordered to be recorded. The decree, after adjudging that certain sums were due to the different legatees, concludes thus: "All the above specified legacies to be paid according to the terms and conditions of the last will of said deceased, with interest from this date, to be subject to such payments as may have heretofore been made, with interest thereon from the time they were made." *Held*, that the decree was final, especially as the will did not require any thing to be done to entitle the legatees to receive their portions; and that an execution might issue under the statute, in favor of each legatee, for the amount respectively adjudged him, or her. *Elliott v. Mayfield and wife*. 223.
2. Where there are several legatees and several executors, a decree by the orphans' court, in favor of one or more of the legatees, against one of the executors, and in favor of other legatees against the other, even if it be irregular, is not void; and an execution may thereon issue. *Ibid*.
3. Although a *scire facias* may not have lain at common law, to revive a judgment in a personal action, where no execution had issued thereon within a year and a day after its rendition, yet the long continued practice in this

JUDGMENT AND DECREE—CONTINUED.

State, of thus reviving such judgments, before our statute upon this subject, tacitly modified the common law. *Ibid.*

4. The assignment of a judgment, is a transfer of the money to be collected on it, and when collected by the attorney of the original plaintiff, who has had notice of the assignment, is held for the use of the assignee. *Gayle & Safold v. Benson.* 234.
5. An *alias* execution cannot issue after the death of the defendant in execution, without a revival of the judgment, unless such *alias* is issued to continue a lien acquired by a former execution, issued in the life-time of the defendant. *Fryer, adm'r v. Dennis.* 254.
6. Where an action is brought by two, it is irregular to render a judgment in favor of one. *Allen and Dean v. Bradford and Shotwell.* 281.
7. A judgment may be amended *nunc pro tunc*, although no execution has issued on the original judgment within a year and a day from its rendition; but if a *scire facias* was necessary to authorise the issuance of the execution on the original, the same step must be taken on the amended judgment, as the entry is made, *nunc pro tunc.* *Ibid.*
8. A judgment *nunc pro tunc* may be entered without notice to the opposite party. *Ibid.*
9. An order of the circuit court to sell land, levied on by a constable, is not such a final judgment as a writ of error will lie from. *White & Bingham v. Shannon.* 286.
10. The terms "in due form," as used in the act of Congress of May, 1790, which provides for the authentication of the records and judicial proceedings of the courts of a sister State, merely mean that the attestation of the clerk shall be according to the form prescribed for the Court where the proceedings were had; and the certificate of the presiding judge is made the only evidence that such form has been observed. *McRae v. Stokes and Smith.* 401.
11. In the attestation of the clerk it was affirmed, that the records of another court lately existing in the town in which his court was holden, (and in which late court the judgment was rendered,) had by law been there transferred; the presiding judge certifying that the attestation was "in due form," it was *held*, that the transcript was sufficiently authenticated, without the production of the law by which the transfer was made. *Ibid.*
12. The declaration described a judgment recovered at — in the county of Richmond, in the State of New-York, by and before the supreme court of judicature for said county and State; the exemplification produced, was a judgment rendered by the supreme court of judicature of the people of the State of New-York, at the city of Albany—*Held*, that the record offered in evidence, was not admissible under the plea of *nul tiel record.* *Pearsall v. Phelps.* 525.
13. The defendant being sued on the exemplification of a judgment, rendered in the State of Mississippi, pleaded that he was not a citizen of Mississippi; was not there at any time pending the suit, nor was he notified of its pendency by the service of process or otherwise, and that he did not appear to, or defend the same, either personally, by attorney or otherwise—*Held*, that the plea was not bad on demurrer, that if there was any thing in the record which would estop the defendant from interposing such a plea, it should have been replied. *Puckett v. Pope.* 552.
14. Lands of the debtor, within the county, are bound by the rendition of a judgment, and not merely from the teste of the execution, or the time of its receipt by the sheriff. *Morris v. Ellis.* 560.

JUDGMENT AND DECREE—CONTINUED.

See *Evidence*, 28.

See *Amendment*, 2.

See *Intendments and Legal Presumptions*, 7, 8.

See *Executors and Administrators*, 11.

JUDICIAL DAY.

1. The 25th day of December, is not *dies non juridicus*, nor will a writ of error be quashed, because it was issued on that day. *Starko v. Marshall & Cammack*. 44.

JURISDICTION.

1. On appeal from a justice of the peace, the amount of damages laid in the declaration is matter of form, and cannot be looked to to show that the court had no jurisdiction; that is ascertained by the amount of the recovery. *Cothran, et al. v. Weir*. 24.
2. Where several defaults, for not paying over money on distinct executions, were embraced in the same motion, as the amount of each default was sufficient to give the court jurisdiction—*Held*, that no objection could be taken after a verdict, on an issue made up on the motion, to the union of separate causes of action in the same motion; the court considering it equivalent to a consolidation, by consent, of distinct motions, *Morgan, Mann and Ball v. Billings*. 172.
3. The city court of Wetumpka is a court of limited jurisdiction, and has no authority to issue a *certiorari* to a justice of the peace. *Gray v. Apperson, use, &c.* 328.
4. A Judge of the county court has no authority to award a writ of *certiorari*, returnable into the circuit court, in a suit for a forcible entry and detainer. *Corner v. Corner*. 524.
5. Where a statement filed in an appeal case, describes a note of fifty dollars, it is not available on error, that the sum sought to be recovered was beyond the jurisdiction of the justice of the peace; *non constat* but the interest had been remitted. *Bentley, et al. v. Wright*. 607.

See *Bonds*, 2.

See *Chancery*, 10.

See *Orphan's Court*, 1, 3, 4, 5.

See *Abatement*, 5.

JURY.

1. When the office of sheriff is full, and a temporary inability of the sheriff to act, from sickness, the court has no power to direct the coroner to impanel a jury in a criminal case. *The State of Alabama v. Monk*. 415.
2. A person who removed to the territory of Louisiana after the treaty of Paris, in 1803, and before its admission into the Union as a State, and was an inhabitant thereof from the time of his removal until after the adoption of the State Constitution, and its admission into the Union, does not thereby become a citizen of the United States. *The State v. Primrose*. 546.

See *Practice at Law*, 9.

JUSTICES OF THE PEACE.

1. A Justice of Peace has the power to supply the loss of any paper relating to a cause pending before him. *Cunningham v. Green*. 127.
2. A justice of the peace, in the issuance of an execution, acts ministerially and not judicially, and may, therefore, delegate that power to another; and it is not necessary that such delegation should be in writing. *Kyle v. Evans, et als.* 481.

LEGACY AND DISTRIBUTIVE SHARE.

1. The action of account, or other appropriate action at law, though given by statute, does not exclude any other statute remedy for the recovery of legacies. *Elliott v. Mayfield and wife.* 223.
2. A testator bequeathed to his wife "one thousand dollars in cash to be paid her out of the money due me (him) in the State of Virginia, from Thomas McCargo, when the same shall be collected." He also bequeathed the balance of the debt, after his wife should be paid, to his son: *Held*, that the wife was entitled to her legacy, if so much was collected of the debt, without abatement for the charges of collection; the residue of the debt being more than ample for that purpose. *Childress v. Childress.* 752.
3. A bequest of the balance of the debt or money due the testator from an individual named by him, after the payment of a legacy with which he had charged it, means so much as shall be realized over and above the charge, after the costs of collection shall have been paid; for these costs the estate generally, shall not be bound; it appearing from the will that the testator had specifically devised and bequeathed his property. *Ibid.*
4. Although the second section of the act of 1830, to extend the powers of the orphan's court, &c. does not expressly mention legatees, yet they are entitled to the remedy it affords, and may have execution of decree of the orphan's court in their favor. *Ibid.*
5. The act of 1806, "concerning wills and testaments," &c. gives an action at law to a legatee against an executor, the limitation to the prosecution of which is six years; and after the expiration of that period a suit in equity, cannot be brought for the recovery of a residuary legacy, &c. *Wood v. Wood, et al.* 756.

LIEN.

1. The vendor of land, has a lien, in equity, on the land sold for the unpaid purchase money, where he has not taken personal security for its payment, or a distinct collateral security as a pledge or mortgage. *Foster v. The Trustees of the Athenæum.* 302.
2. A surety paying a debt, stands in the place of the creditor, and is entitled to the benefit of all securities which the creditor had for the payment of his debt. But he can not assert a lien, in virtue of the instrument on which he is surety, as that becomes *functus officio*, by the payment of the debt secured by it. *Ibid.*
3. A surety of a vendee, who is compelled to pay the purchase money, has no lien in equity upon the land. *Ibid.*
4. A number of gentlemen associated themselves together, to establish a female school, of which one W was the nominal head; and purchased a house for the contemplated school, of D, at the price of six thousand dollars; of which sum two thousand dollars was paid down, in the funds of the association, and the residue secured, to be paid by two bills of exchange, drawn by one L on W, and by him accepted. The bills were payable to, and endorsed by one H to F, by him to R S F, and by him to D, the vendor of the land, who thereupon conveyed the premises to W. The company were afterwards incorporated, and the first bill which fell due, was paid with the funds of the corporation. Afterwards, W conveyed the property to the corporation, taking from four persons, (F being one) who describe themselves as trustees of the corporation, a covenant to indemnify him from liability on his acceptance of the last bill of exchange. F was sued on the bill as endorser, and compelled to pay it, and filed his bill asserting a lien in equity, on the house purchased from D, to the extent of the sum paid by him, in preference to certain creditors of the corporation, who had obtained from it a deed of trust on

LIEN—CONTINUED.

the house, with notice of his lien: *Held*, First, that F was a mere surety for the corporation, and that the payment by him of a part of the purchase money, gave him no lien on the land. Second. That neither D nor W had any lien in equity, on the land to which F could be subrogated,—admitting he had such a right—That D had no such lien, because he had taken the security of two persons for the payment of a part of the purchase money who were not members of the corporation; and that although W could not have been compelled to make title to the company until they had paid the purchase money for which he was bound, he had voluntarily relinquished this advantage, on being indemnified by F and others, and could not be permitted afterwards to assert it. *Ibid*.

5. When the sheriff demands a bond of indemnity from the plaintiff in execution, which is not given, he may deliver the property levied on to the person from whose possession it was taken, but if he does not do so, but retains it, the lien continues. *Pickard, et als. v. Peters, use, &c.* 493.
6. Where, upon the refusal of the plaintiff in the senior execution to indemnify the sheriff, on his demand, the plaintiff in a junior execution gives the necessary bond, the levy of the senior execution is discharged, and the lien transferred to the younger execution. *Ibid*.
7. Lands of the debtor, within the county, are bound by the rendition of a judgment, and not merely from the teste of the execution, or the time of its receipt by the sheriff. *Morris v. Ellis.* 560.
8. When a mortgage of personal estate, which is removed to this, from another State, subsequently to the incumbrance, has lost its priority of lien, as to creditors whose debts are contracted here after the removal of the property, under the act of 1823—Aikin's Digest, 207, § 4—this matter can not be urged by the personal representatives of the mortgagor, as a defence to the mortgagee's bill for foreclosure and sale. The proper course, under this statute, where the creditor has obtained no specific lien by judgment and execution, is to file a bill against the personal representative of the mortgagor, joining the mortgagee, and asserting the right to satisfaction for his debt, by subjecting the mortgaged chattel to its payment. *Stewart and Irvine v. Fry's adm'rs.* 573.

See Chancery, 21.

See Vendor and Vendee, 6.

LIMITATIONS, STATUTE OF.

1. Where issue is joined on the plea of the statute of limitations, the jury have nothing to do with the justice of the account. *Shaw v. Yarborough.* 588.
2. The plaintiff may reply the statute of limitations to an account pleaded as a set-off, notwithstanding the claim sued on is obnoxious to the same defence, which the defendant omits or neglects to plead. *Ibid*.
3. The exception in the statute, in favor of dealing between merchant and merchant, must be relied on by a replication to the plea. *Ibid*.
4. A promise by one of several executors or administrators, will not take a case out of the statute of limitations. *Caruthers & Kinkle v. Mardis' adm'rs.* 599.
5. An account consisting of the price of a carriage, purchased and paid for by the plaintiff for the defendant, at his request, together with the costs of the transportation from New York to New Orleans, is not an open account, so as to be barred by the statute of limitations of three years. *Ibid*.
6. All the plaintiffs to an action, must be competent to sue, otherwise the action cannot be maintained; when, therefore, the statute of limitations has

LIMITATIONS, STATUTE OF—CONTINUED.

- begun to run against one of several parties intitled to a joint action, it operates as a bar to such action. *Hardeman, et als. v. Sims, et als.* 747.
7. Where the remedy at law and in equity, is concurrent, the statute of limitations applies alike in both forums. In the case of a *strict trust*, and where a fraud has been practised, the statute will not operate *proprio vigore*; unless perhaps the trustee in the first case has placed himself in a position antagonistical to the *cestui que trust*, or in the latter until the fraud has been discovered. *Wood v. Wood, et al.* 756.
 8. The act of 1806, "concerning wills and testaments," &c. gives an action at law to a legatee against an executor, the limitation to the prosecution of which is six years; and after the expiration of that period a suit in equity, cannot be brought for the recovery of a residuary legacy, &c, *Ibid.*
- See Pleading, 27.*
See Evidence, 12.

MANDAMUS.

1. Where a motion was made for a new trial at the term at which the judgment was rendered, but the court adjourned without disposing of it, the refusal of the Judge at the next term, to hear the motion and decide it on its merits, will not authorise a reversal of the judgment in the cause. A *mandamus* is the appropriate remedy to compel a court to enter and decide upon a matter within its discretion. *Bridges and Beers v. Miller.* 746.
- See Error, and Writ of, 9.*

MILLS.

1. In proceeding by writ of *ad quod damnum*, to establish a mill, its location should be ascertained, either by the inquest or the judgment of the court, with sufficient certainty of description to enable a surveyor to find the place designated. Nothing can be claimed under a grant to build a mill in number seven, of township nineteen, of range twenty-five; as the location is not sufficiently definite. *Macon and Stephens v. Owen.* 116.
2. Where a writ of *ad quod damnum* was sued out on the seventh of September, 1836, returnable to the next term of the Orphans' court, (which holds its sessions monthly,) and no proceedings are had on it until the next February, it is to be considered as abandoned; and a grant to build a mill, afterwards made on this writ, will not over-reach a grant made to another, who sued out his writ in December, 1836, and prosecuted it without delay, so as to obtain a judgment in January, 1837. *Ibid.*

MORTGAGE.

1. Where, on motion of the purchaser, at a sale of mortgaged premises, under a decree of foreclosure, a writ of possession is directed by the Chancellor to issue against the person in possession, an appeal from such order, by the tenant, against the purchaser, is the most appropriate remedy; but as such an order is final in its character, a writ of error will lie. *Creighton, et als. v. The Planters and Merchants' Bank.* 156.
2. The profits arising out of the use of a personal chattel, may be made the subject of a mortgage. *Stewart and Irvine v. Fry's adm'rs.* 573.
3. Where the mortgagee permits the mortgagor, who is also the debtor, to receive the mortgaged profits, the former is not entitled to have an account against the personal representatives of the latter, for sums received by him in his lifetime. *Ibid.*
4. And the rule is the same, although there is a specific contract, to apply the profits to the extinguishment of the debt. In such a case, the profits, when

MORTGAGE—CONTINUED.

received by the mortgagor, and carried into his general funds, can not, after his death, be reached by the mortgagees, as a trust. The trust fund is not capable of distinction, and it remains only as a general debt against the estate. *Ibid.*

5. Such a contract, to apply the profits in extinguishment of the debt, is binding on the personal representative, and if profits are realized by him from the use of the chattel after the mortgagor's death, they are to be accounted for to the mortgagee, and are not to be considered as general assets of the estate. *Ibid.*

See Surety, 5.

See Lien, 9.

ORPHANS' COURT.

1. In the execution of a will, questions may arise, which the Orphans' court is incompetent to determine; and where a trust, technically so called, is required to be enforced, a court of equity must be resorted to. *Elliott v. Mayfield and wife.* 223.
2. The Orphans' court being authorised to direct the real estate of a testator or intestate to be sold "either for money, or on credit," it may order that it be sold for cash as to a part of the purchase, and on a credit as to the residue. *The heirs of Griffin v. Griffin's ex'rs.* 623.
3. The Orphans' courts of this State have not power to cite an executor or administrator to make settlement, unless he derives his appointment from the court issuing the citation. *Taliaferro, adm'r de bonis non of Thompson v. Bassett and wife, &c.* 670.
4. It must appear on the record, that the court has jurisdiction. *Ibid.*
5. The voluntary appearance of the party will not cure the defect. *Ibid.*
6. It is no objection to a decree in favor of a legatee, that she is a co-executrix of the will—the proceeding is at her instance in the former character only. *Childress v. Childress.* 752.

See Court, charge of, 3.

See Guardian and Ward, 1.

See Legacy and distributive share, 4.

PARTNERS AND PARTNERSHIP.

1. Where a note is executed by one partner during the existence of the firm, its effect, *prima facie*, is to bind all the members, and this *prima facie* indentment is not done away by a plea that the note was executed by one of the partners for his sole and individual debt. The onus of proof of the consideration of a promissory note, can not be thrown on the plaintiff by any mode of pleading. *Jones v. Rives.* 11.
2. One of a firm of tavern keepers, has no authority to bind his co-partner, by a note, of which the consideration has no connexion with the business of the joint concern; and the want of such consideration may be shown in defence to an action, by a *bona fide* holder of the note. *Cockey v. The Branch Bank at Mobile.* 175.
3. A sheriff is justified in levying an execution against the goods of one partner, on the goods belonging to the firm, and in an action of trespass against him by the firm, evidence is not admissible to prove that the partnership goods were not more than sufficient to satisfy their debts. *Moore & Co. v. Sample.* 319.
4. When the sheriff levies on the interest of one partner, he is justified in taking exclusive possession of the goods of the firm, until the aid of a court of equity is successfully invoked. *Ibid.*

PARTNERS AND PARTNERSHIP.—CONTINUED.

5. One partner may sue another at law, on a note which the latter gave him upon engaging in business, for the payment of a part of the capital stock—and *Semble*, if one partner give the other his note or acceptance for value received on the partnership account, an action will lie on such note or bill. *Grigsby's ex'r and ext'x v. Nancé*, 347.
6. Where one of two partners to a writ sued out against the firm, acknowledged service of the writ, thus—"I hereby acknowledge service of the within original writ, waiving copy; signed, Thomas S. Clark, one of the firm of Clark & Law"—*Held*, that this was not an acknowledgement of service of the writ on behalf of the firm. *Clark's adm'rs v. Stoddard, Miller & Co.* 366.
7. The voluntary appearance of an administrator, and consent to become a party to the suit, is an admission of record that his intestate was served with process. *Ibid.*
8. It is competent for partners, upon the dissolution of the partnership, to invest each other, or any one of their number, with authority to borrow money and make notes upon their joint account, in order to pay the debts of the firm; and where such an authority is conferred, the statement of one of them, upon obtaining a loan of money, that it was to be applied in the payment of a firm debt, is evidence against the others. *Catlin, Peeples & Co. v. Gilders, ex'r and ext'x.* 536.
9. The extent to which partners may pledge the responsibility of each other, is not to be determined from the articles of partnership under which they associated, but from the character of their dealings, and the manner in which they hold themselves out to the world. *Ibid.*
10. S agreed with R to furnish the goods of a mercantile establishment, which the latter undertook to sell and receive for his services one half the profits; R furnished none of the goods, nor was he liable for any loss: *Held*, that R was not an ostensible partner of S. *Shropshire v. Shepperd.* 733.
11. It is not necessary to join a *dormant partner*, with an ostensible partner in an action against a person who dealt only with the latter. *Ibid.*

See Evidence, 32.

PATENT.

1. The record of a patent issued by authority of a law of the United States, is a public act, and if a second or duplicate patent should issue, it is of as high authority, and has the same effect as the original or first patent. *Hines v. Greenlee and Greenlee.* 73.

See Chancery, 4.

PERJURY.

See Indictment, 4, 5.

PLEADING.

1. According to the modern practice, *oyer* is not demandable of a record, unless it be of a deed enrolled, letters of administration, &c. *Chiles v. Beal.* 26.
2. The proper mode of taking advantage of a misrecital of a record in pleading, is, by the plea of *nul tiel record*, concluding with a prayer that the same may be inspected by the court. A demurrer in such case, would not avail the defendant, because the record misrecited, does not become a part of the proceedings in the cause, until it is made such by bill of exceptions. *Ibid.*

PLEADING—CONTINUED.

3. A declaration describing a promissory note as bearing date in November, 1836, and payable on the 1st day of March, eighteen hundred and twenty-nine, meaning thirty nine, must be considered as containing a sufficient cause of action, after a judgment by default. *Cater and Greening v. Hunter*, adm'r. 30.
4. The defendant omitting to plead to such a declaration, thereby admits the cause of action as stated, and the damages may be ascertained by the clerk, without the intervention of a jury. *Ibid.*
5. When the suit is commenced by attachment, it is unnecessary to carry into the declaration any of the recitals contained in the bond and affidavit, as these have no connexion with the cause of action. *Reynolds v. Bell*. 57.
6. Each count in a declaration is considered as the statement of a distinct cause of action, and where all are negatived by plea, the plaintiff is entitled to recover, by proving the allegations of either. *Maupay v. Holley*. 103.
7. The improper addition of a *super se assumpsit* cannot be reached by a general demurrer where it may be stricken from the declaration, and enough remain to constitute a good cause of action; but the introduction of a *super se assumpsit* can not have the effect to change the liability of the defendant, or authorise a judgment for a stipulated sum, if it is in reality in the nature of a penalty. *Williams, use, &c. v. Young*. 145.
8. The plaintiff declared on a written contract, made the 9th of July, 1838, to teach an English school for that year; the contract produced, was dated of that day, and was a stipulation to teach an English school for one year, without stating when it began—*Held*, that the contract given in evidence was variant from that declared on, and consequently inadmissible. *McLendon v. Godfrey*. 181.
9. If the plaintiff relies upon an excuse for a failure to perform his contract, he must specially allege it in his declaration; but it seems, if he has been prevented from performance under such circumstances as entitle him to recover as much as he would, had he actually performed his contract, he may allege a performance generally. *Ibid.*
10. A plea, *puis daren continuance*, is a waiver of, and substitute for all former pleas, and must allege matter of defence arising after issue joined. *Sadler, surviving partner, &c. v. Fisher's adm'rs*. 200.
11. Matter which has arisen pending the suit, but before plea pleaded, is an original plea, pleadable with other pleas in bar, under the statute which allows a defendant to plead several pleas. *Ibid.*
12. The words "payment and set-off," or other brief designation of the defence, though signed by the defendant's counsel, will not be regarded as a plea; unless the plaintiff elects to treat it as such. *Ibid.*
13. When there are several counts to a declaration, a general demurrer to the whole can be sustained, only in the event that there is a misjoinder of actions if any one of the counts are sufficient. *The Bank of Mobile v. Huggins, adm'r of Vedder, &c.* 206.
14. Whenever a contract includes a bailment, and it is broken by the bailee, either case or assumpsit may be brought by the bailor. A count, setting out a contract, to perform specific acts, with respect to a note deposited for collection, and showing a breach of the contract, is a declaration in assumpsit. *Ibid.*
15. The first count set out a parol contract and breach, and concluded as in case; the second count was in assumpsit: *Held*, on demurrer for a misjoinder of counts, that the conclusion of the first count might be rejected as surplusage. *Pharr & Beck v. Bachelor*. 237.

PLEADING—CONTINUED.

16. In an action upon a verbal contract, *time*, in general, forms no material part of the issue; therefore one time may be assigned to a given fact and another proved. But to tolerate this latitude in pleading, *time* should be laid under a *videlicet*, and should not be intrinsically impossible, or inconsistent with the fact to which it relates. *Ibid.*
17. In pleading, the legal effect and identity of the contract should be stated, and any variance in this respect, relating to the promise or undertaking, upon which the action is founded, or the consideration thereof, will be fatal. *Ibid.*
18. Where the declaration alleges, that the plaintiff was prevented from performing his part of the agreement, either by the refusal of the defendant to permit him, or by some act or omission on his part, such an allegation is not sustained by proof, that the contract was rescinded by mutual consent, and the defendant agreed to pay the plaintiff for his services, &c.; but the modified contract should be declared on. *Ibid.*
19. A plea that a note or bond was given without any consideration, is good under our statute. *Giles v. Williams*, use, &c. 316.
20. A plea impeaching the consideration of a bond given for the purchase of land, which does not show either that the contract has been rescinded, or that the purchaser has lost the possession of the land, is bad. *Ibid.*
21. A plea alleging that a "bond was obtained by fraud, covin and misrepresentation is bad. Even in this State, where the consideration of a bond may be impeached, the facts which constitute the fraud must be stated. *Ibid.*
22. Where the instrument sued on is executed by one, who professes to be an agent, the plaintiff is not required, under our statute, to prove the authority of the agent, unless that fact is put in issue by a plea, verified by affidavit. The statute applies as well to corporations as to individuals. *The Trustees of the Gainesville Female Academy v. Brown*. 326.
23. The statute, making the instrument itself, unless questioned by plea, evidence of the debt or duty for which it was given, there was no necessity on the part of the plaintiff, in the absence of such plea, to prove the consideration, or that the contract was within the scope of the legitimate objects of the corporation. *Ibid.*
24. Where a defendant demurs and pleads to the entire declaration, the plea being posterior in the order of proceeding, operates as a waiver of the demurrer. *Grigsby's ex. and ext'x v. Nance*. 347.
25. To a plea of *non claim*, it is proper to reply, that the debts sued for were contracted in the states of Mississippi and Louisiana, as debts contracted out of the state are expressly prohibited from the operation of the statute. *Sanford, adm'r v. Wicks*. 369.
27. To a plea of *plene administravit*, it is proper to reply that on a certain day before the commencement of the suit, and on divers days between that and the day of pleading the plea, defendant had assets in his hands sufficient to pay the debt, which he could and ought so to have applied. *Ibid.*
28. The plaintiff claimed the slaves in question under a bill of sale which his wife's father had executed and delivered to her, previous to her marriage—the defendant claimed the slaves under the will of the father; under the plea of the statute of limitations: *Held*, that it was allowable for the defendant to show the nature of the father's *possession*, and that it was *adverse* to the claim set up by the plaintiff. *Williams v. Haney*. 371.
29. A plea averring that the note in suit was given for an interest in two lots in the town of Dadeville—that the lots were in the first instance purchased by one W, the condition of the sale to him, being that the title was not to be

PLEADING—CONTINUED.

- made until the payment of the purchase money—that W died without making full payment; that with a knowledge of these facts, the plaintiff fraudulently sold the lots to the defendant, and can not make, or obtain to be made, a title therefor; and that the defendant has not now, and never had, possession of the lots: *Held*, to be bad. 1st, because a plea alleging fraud, must show in what the fraud consists; and the facts stated in the plea are no evidence of a fraudulent intention. 2, When the contract is still subsisting, it is no defence to an action for the purchase money, that the defendant is not in possession of the land. 3, While the contract remains in force, it is no defence to an action at law, for the purchase money, that the vendor can not make a title, as he is responsible on his covenant for failing to make title. *Clay, et al. v. Dennis, use, &c.* 375.
29. When a plea begins as an answer to a part of the declaration, and is in truth nothing more, the plaintiff cannot demur, but must take judgment by *nil dicit*, for the part unanswered. But if a plea profess in its commencement to answer more than it afterwards answers, and the part unanswered is material, and of the gist of the action, the whole plea is bad on general demurrer. *Deshler v. Hodges, use, &c.* 509.
30. The real estate of an intestate was sold by commissioners under the order of an Orphans' court, and a note taken from the purchaser; at the same time it was agreed between the commissioners and the purchaser, that the note should be paid only in proportion to the interest it should afterwards appear the intestate had in the land; a suit being brought in equity to ascertain the intestate's interest, during its pendency, an action was brought on the note, to which the foregoing facts were specially pleaded in bar: *Held*, that the plea was bad on demurrer, and if the matter was available as a defence, it should be pleaded in abatement. *McKenzie & Curry v. McColl, Judge.* 516.
31. When no special venue is disclosed in an action on a bill of exchange, the place of drawing will be inferred, on demurrer, to be that stated in the margin of the declaration. *Moore v. Bradford.* 550.
32. The entering of a *nolle prosequi* to the last count of a declaration, does not carry with it the breach of the contract, which is assigned at the end of the declaration. *Ibid.*
33. The defendant being sued on the exemplification of a judgment, rendered in the State of Mississippi, pleaded that he was not a citizen of Mississippi; was not there at any time pending the suit, nor was he notified of its pendency by the service of process or otherwise, and that he did not appear to, or defend the same, either personally, by attorney or otherwise: *Held*, that the plea was not bad on demurrer, that if there was any thing in the record which would estop the defendant from interposing such a plea, it should have been replied. *Puckett v. Pope.* 552.
34. A plea that the defendants were not joint administrator and administratrix, is frivolous. *Elliott's adm'x v. Eslava.* 568.
35. An *estoppel* must, in general, be pleaded; if offered in evidence, the jury are not precluded from finding the truth of the case. *Ibid.*
36. Oyer can not be craved of any writing, which is not the foundation of the action. *The Mayor, &c. of the city of Tuscaloosa v. Lacy, et al.* 618.
37. When the condition of a bond is to perform the duties of treasurer, under a certain ordinance of a city corporation, and the ordinance is not set out, breaches of the condition can not be shown, without averments of the specific duties required by the ordinance. *Ibid.*

PLEADING—CONTINUED.

See Abatement, 1, 6.

See Contract, 8.

See Garnishee, 4.

See Bills of Exchange and Promissory Notes, 8.

See Error, and Writ of, 11, 18.

See Executors and Administrators, 6.

See Attachment, 10.

See Evidence, 31.

See Indorsement, 3.

See Corporation and By-Laws, 8.

See Partners and Partnership, 11.

PRACTICE AT LAW.

1. The expurgatory oath required by statute [Aikin's Digest, 283, § 127] to be taken by the defendant, before the plaintiff can be required to prove the execution of a written instrument, it being the foundation of the suit, only revives the common law, so far as to affect the particular case, and does not impose on the plaintiff the necessity of proving his case more fully than required by the common law. *Jones v. Rives*. 11.
2. Where a note is executed by one partner during the existence of the firm, its effect, *prima facie*, is to bind all the members, and this *prima facie* intendment is not done away by a plea that the note was executed by one of the partners for his sole and individual debt. The onus of proof of the consideration of a promissory note, cannot be thrown on the plaintiff by any mode of pleading. *Ibid*.
3. According to the modern practice, *oyer* is not demandable of a record, unless it be of a deed enrolled, letters of administration, &c. *Chiles v. Beal*. 26.
4. The proper mode of taking advantage of a misrecital of a record in pleading, is, by the plea of *nul tiel record*, concluding with a prayer that the same may be inspected by the court. A demurrer in such case, would not avail the defendant, because the record misrecited, does not become a part of the proceedings in the cause, until it is made such by bill of exceptions. *Ibid*.
5. A declaration describing a promissary note as bearing date in November, 1836, and payable on the *1st day of March, eighteen hundred and twenty-nine*, meaning *thirty-nine*, must be considered as containing a sufficient cause of action, after a judgment by default. *Cater and Greening v. Hunter, adm'rs*. 30.
6. The defendant omitting to plead to such a declaration, thereby admits the cause of action as stated, and the damages may be ascertained by the clerk, without the intervention of a jury. *Ibid*.
7. An appearance by the defendant in a suit, commenced by attachment, will have the same effect as a waiver, as it would have in a suit commenced in the usual mode. *Burroughs v. Wright*. 43.
8. A motion to quash or set aside process, is always addressed to the discretion of the court, and though such a motion may be entertained, yet its refusal cannot be examined on error. This court will not examine the refusal of an inferior court to quash an attachment. *Reynolds v. Bell*. 57.
9. All the defendants to a cause constitute but one party, and in a civil cause, are entitled to but four peremptory challenges. It would therefore be irregular to permit a further peremptory challenge; but, if the cause was tried by an impartial jury, such irregularity would not be available on error. *Bibb, Judge, &c. v. Reid & Hoyt*. 88.
10. On a contract, for the payment of eight dollars per acre, rent for a lot of ground supposed to contain ten acres, *more or less*, a final judgment can not

PRACTICE AT LAW—CONTINUED.

- be rendered by default for the rent of ten acres, but a writ of inquiry must be executed. *Driver and Shelly v. Spence.* 98.
11. The sheriff returned the writ executed on one defendant; as to the other defendant, there was an acknowledgment of service indorsed on the process, and subscribed with his name, but there was no proof of its genuineness—*Held*, that a judgment by default, against both defendants, was irregular.—*Ibid.*
12. When two persons were garnisheed as co-partners, and appeared and answered, and the judgment was afterwards rendered against one, as surviving partner, this court will presume the necessary proof was made, in the court below, of the death of one of the firm. *Gaines v. Beirne & McMahon.* 114.
13. A promise in writing, by N and A to R, to discharge, pay, and satisfy certain debts due by R and A, as partners, is not within the act of 1818, authorizing a discontinuance, when the writ is not executed upon all the defendants, and therefore, a discontinuance in such case, as to one, is a discontinuance of the action. *Norwood v. Rossiter.* 134.
14. W M declared as “administrator,” without designating the estate on which he had administered, and disclosed as the cause of action, the indorsement of a promissory note by the defendant to the plaintiff; upon the cause being called for trial, W S P, administrator *de bonis non* of J G, deceased, was made a plaintiff, instead of W M—*Held*, that the declaration was by W M, individually, and the administrator of a third person could not be substituted as a plaintiff. *Curry & Co. v. Paine, adm'r, &c.* 154.
15. Where it is proposed to revive a suit in the name of an administrator as plaintiff, the defendant may require the production of the letters of administration; but if he pleads the *general issue*, he can not require them to be adduced to the jury. *Ibid.*
16. The plaintiff moved to strike out two of defendant's pleas, and took issue on one; the defendant moved for judgment on the pleas not replied to; the court did not decide upon either of the motions, and the case was tried on the issue—*Held*, that as the pleas were not mere nullities, though they were demurrable, the refusal to strike them out, on motion, or to put the plaintiff to his demurrer, was an error, under our practice, of which the defendant might avail himself. *Sadler, surviving partner, &c. v. Fisher's adm'rs* 200.
17. Impertinent matter, foreign to the cause, need not be proved; but *Seemle*, an immaterial averment must be proved, where the subject of it is a record, a written instrument, or perhaps an express contract, otherwise, there might be a variance between the pleading and the proof. *Pharr & Beck v. Bachelor.* 237.
18. Since the passage of the act of 1839, “to abolish attorneys fees in certain cases,” it is not allowable to render a judgment by default at the appearance term, without the defendant's consent. *O'Neal v. Garrett, use. &c.* 276.
19. Where the plaintiff prevails upon a demurrer to a plea in abatement, the judgment is not final, but that the defendant answer over. *Cravens & Justiss v. Bryant.* 278.
20. The oath which the act of 23d December, 1837, to obtain the testimony of a party to the suit, requires to be made of the materiality of the testimony sought to be obtained, may be made by a stranger to the suit, and therefore sufficient if made by the attorney of the party. *Young v. The adm'rs of McLemore.* 295.
21. The failure of the defendant to answer interrogatories thus filed, would authorize a judgment by default against him, and be an admission that the

PRACTICE AT LAW—CONTINUED.

- plaintiff was entitled to some damages; but judgment final could not be rendered without the intervention of a jury, except for nominal damages, in a case where the clerk could not compute the damages. *Ibid.*
22. Under the act of 1839, which allows the oath of the plaintiff to be received in suits upon accounts not exceeding one hundred dollars, the deposition of the plaintiff may be taken, under circumstances that will authorise the taking the deposition of any other witness. *Moore v. Hatfield & Smith.* 442.
23. A judgment is never arrested for extrinsic matter, not appearing on the record itself. *Williamson & Daniel v. The Branch Bank at Montgomery.* 504.
24. Upon the margin of the judgment entry, the suit was stated against the defendants in the firm name; the process had been served on one of the defendants, and he only pleaded; the judgment recites that the parties came by their attorneys, and the jury were empannelled to try the issue joined—*Held*, that the reasonable inference is, that they only appeared who were parties to the issue tried. *Catlin, Peeples & Co. v. Gilders, ex'r & ex'rx.* 536.
25. Where there are two defendants, only one of whom is served with process, and pleads, and the judgment entry recites that the parties came by their attorneys, and thereupon came a jury, &c. it will be intended that they only came who had made up an issue to be tried by jury. *Puckett v. Pope.* 552.
26. Where a judgment final, was rendered for the defendant on demurrer to several pleas in bar, such a judgment put an end to the suit, and if the cause is afterwards tried on the *general issue*, the judgment will not be reversed for an error in the exclusion of evidence. *Ibid.*
27. A married woman, whose husband has abjured the State, and who since that event has traded as a *feme sole*, and taken notes in her own name, may sue for and recover the amount. *Arthur & Corprew v. Broadnax.* 557.
28. A petition under the act of 1822, by an executor or administrator, for an order to sell the real estate of his testator, or intestate, should particularly state which of the heirs are of age, and which are infants, or *femes covert*. The heirs of *Griffin v. Griffin's ex'r.* 623.
29. It is competent for a court to correct, or set aside an entry at the term at which it was made, but this cannot be done at a subsequent term, upon a mere allegation that an improper entry had been made by the neglect or inadvertence of the clerk. *Holloway v. Washington.* 668.
30. The act of February, 1839, "to abolish attorneys fees in certain cases," inhibits the rendition of a judgment in an action brought for the collection of money, at the appearance term: unless it be by *express* consent. *Dupree & Hampton v. Smith.* 736.
31. An insufficient writ, or one which is variant from the declaration, can't be reached by a demurrer, or on error. *Palmer v. Lesne.* 741.
32. *Seemle*, to authorise the court to adjudge that the discontinuance of a suit as to one of several joint defendants, where the case does not come within the act of 1818, is a discontinuance of the action, it is not enough that the objection to the discontinuance is shown by the writ alone. *Ibid.*
33. A court may, in the exercise of its discretion, award a new trial, but it cannot order a non-suit, or discontinuance, upon the ground that the declaration is variant from the writ, where the variance is not regularly brought to its view by the pleading. *Ibid.*

See Evidence, 2.

See Error, and Writ of, 1, 2, 5, 7, 10, 18, 19, 20.

See Gaming, 1.

See Garnishee, 5, 6.

PRACTICE AT LAW—CONTINUED.

- See *Intendments and Legal Presumptions*, 1, 3, 7, 8, 9.
- See *Justice of the Peace*, 1.
- See *Bonds*, 4.
- See *Right of Property*, trial of, 3, 4.
- See *Abatement*, 3.
- See *Contract*, 8.
- See *Process*, 2, 4, 8.
- See *Judgment and Decree*, 8.
- See *Pleading*, 24.
- See *Executors and Administrators*, 3.
- See *Partners and Partnership*, 7.
- See *Summary Proceedings*, 12.
- See *Scire Facias*, 4.
- See *Statute of Limitations*, 1, 3.
- See *Amendment*, 2, 3.
- See *Indorsement*, 2, 3.
- See *Guardian and Ward*, 1.

PRACTICE IN CHANCERY.

1. Exhibits to a bill may be proved *viva voce*, at the hearing: Therefore, when a cause is submitted for a decree, on the bill, answer and exhibits, and a decree made thereon, this court will presume that the exhibits were proved before the Chancellor. *Pierce, et als. v. Prude & Russell*. 65.
2. An order made upon a bill, intended as a bill of review, which suspends proceedings on the decree, in the original cause, ceases to be operative after such bill is dismissed for want of equity. *Hogan v. Davis and wife*. 70.
3. As a *general rule*, the answer of one defendant, in a cause in chancery, is not evidence against his co-defendant. *Taylor v. Roberts*. 83.
4. A matter may be referred to the master, and his report made and confirmed, all at the same term of the court. *Ibid.*
5. Where a bill is improperly dismissed, at the hearing, as to one defendant, and a decree rendered against another, the complainant may reverse the order of dismissal on writ of error. *Ibid.*
6. In a suit in chancery, in which the corporation of the city of Mobile is defendant, a service of the subpoena on the Mayor of the city would be sufficient; but the return of the sheriff, that he had executed it on H. Chamberlaine, Mayor of the city of Mobile, is not proof that Chamberlaine is the Mayor. *Lyon, et als. v. Lorant & Krebs, adm'rs*. 151.
7. The facts, as to which a discovery is sought, and the action of the court demanded, must be stated with reasonable certainty and precision, and the allegations be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer them. *Spence v. Duren, et als.* 251.
8. An appeal will not, in general, lie from an interlocutory order in chancery; yet if such an order will finally affect the merits of the case, or deprive the party complaining of it, of any benefit he may have at the final hearing, an appeal is allowable. *Kennedy's heirs and ex'rs v. Kennedy's heirs*. 434.
9. Where a decree is rendered, disposing of the entire merits of the controversy, and a reference is made to the master to report upon certain matters as the basis of the definitive action of the court, it is competent for the chancellor to direct a special report to be made upon some particular part of the case, and to confirm it, before the master has closed his examination upon the matters referred. *Ibid.*

PRACTICE IN CHANCERY.—CONTINUED.

10. Where the complainants allege that the contract by which the defendant acquired the conveyance of land was founded on a gaming consideration, and the defendant denies it in his answer, the allegation may be sustained by the testimony of witnesses. *Fenno, et al. v. Sayre & Converse.* 458.
11. Where a bill for an injunction is not regularly verified by affidavit, and its allegations are denied upon information and belief only, the injunction should not be unconditionally dissolved for the insufficient verification, but the chancellor should direct that the complainant, or some one acquainted with the facts, should verify the bill in a reasonable time, and default thereof, the dissolution be absolute. *Calhoun, by her next friend, v. Cozens, et al.* 498.
12. Where the allegations of the bill for an injunction are positive, but the answer is a mere denial of them, upon information or belief, the answer does not warrant the dissolution of the injunction. *Ibid.*
13. The prosecution of a writ of error from a decree of the chancellor, dismissing a bill, by which a judgment at law had been enjoined, does not reinstate the injunction and supersede the issuance of an execution, on the judgment at law, although a bond be given with sureties for the prosecution of such writ of error in double the amount of the judgment at law. *Boren, et al. v. Chisholm.* 513.

See *Chancery*, 5, 6, 8, 9, 23, 24, 25, 26, 27, 32.

PRINCIPAL AND AGENT.

1. When a note is deposited with a Bank for collection, and no special agreement is made, the contract to be implied, is one of agency; and no other duties are imposed by law, on a Bank, different from those imposed on any other agent. The first duty of an agent, in such a case is, to follow his instructions; if none are given, it is his duty to present the note at the time and place fixed for payment; or if no place is designated, to use due diligence to make a demand; if payment is refused, it is then his duty to give immediate notice to his principal, that he may take the measures necessary for his own security. These duties are imposed by the general law of agency; but others may arise out of local laws; as if damages are given on the protest of a note; or if a protest is essential to fix the liabilities of other parties. *The Bank of Mobile v. Huggins, adm'r of Vedder, &c.* 206.
2. In the absence of any local custom, it is not incumbent on the agent to notify the indorsers, unless he is directed by his principal to do so; nor to cause the note to be protested, unless this is necessary to fix the liability of other parties, or to give his principal some advantage, which, otherwise, the law would not accord to him. *Ibid.*
3. An agent, in case of neglect of duty, is liable to nominal damages upon the breach of his contract, and if any loss has been sustained by the principal, in consequence of the neglect, he is liable to the actual loss incurred, but not to any greater extent. *Ibid.*
4. The discharge of a solvent party to a note, in consequence of an act of negligence, by the agent, is not an actual loss, when there are other solvent parties, who remain bound to the principal; and it rests with the principal to show, before he is entitled to recover the amount of the note as damages, that the parties who remain bound to him, are unable to pay. *Ibid.*
5. An agent is not liable for an omission to notify the indorsers of a note, deposited with him for collection, unless he is instructed to do so; or unless he omits to inform his principal of the default. *Ibid.*
6. When a note is withdrawn by the owner from the Bank, where it was de-

PRINCIPAL AND AGENT—CONTINUED.

posited for collection, the Bank is not discharged from its liability to damages, if it has omitted to give notice to the principal, of the non-payment. *Ibid.*

7. When a note is deposited with a Bank for collection, and an entry is made on the Bank book of the depositor, the contract of agency is not waived or rescinded, by cancelling the entry in the Bank book. The only effect of such a cancellation is, to show that the note has been returned to the depositor, who is authorised to deal with it as he pleases. *Ibid.*
8. A warehouse-man is an agent of the party storing goods with him merely for the purpose of taking care of them, and a notice to him by one who has made a contract for them, that he will not receive them, is no notice to the seller. *Magee v. Billingsley.* 680.

See *Evidence*, 30; 33.

See *Partners and Partnership*, 8.

PROCESS.

1. The acknowledgement of service of process, indorsed thereupon, subscribed with the name of the defendant, and attested by the clerk, does not authorise the rendition of a judgment by default, unless the acknowledgement, or signature is proved, or admitted in court to be genuine. *O'Neal v. Garrett*, use, &c. 276.
2. *Quere?* Is the failure to discontinue in the primary court, against a defendant not served with process, objectionable on error, where the judgment is only rendered against the party on whom the writ was served. *Ibid.*
3. Where one of two partners to a writ sued out against the firm, acknowledged service of the writ, thus—"I hereby acknowledge service of the within original writ, waiving copy; signed, Thomas S. Clark, one of the firm of Clark & Law"—*Held*, that this was not an acknowledgement of service of the writ on behalf of the firm. *Clark's adm'rs v. Stoddard, Miller & Co.* 366.
4. Where there are several joint executors or administrators within the State, all must be served with process, and discontinuance entered as to one, upon whom process is not served, will be a discontinuance of the action. *Caruthers & Kinkle v. Mardis' adm'rs.* 599.
5. Process intended to be executed by the coroner should be directed to him *eo nomine*; but where a writ directed to the sheriff is executed by the coroner, it will be intended, after a judgment by default, that the direction was proper, and the process received by the sheriff; and as the duties of sheriff, in the event of a vacancy in the office, are devolved upon the coroner by statute, that the contingency had happened and the process was received by the coroner from the sheriff's office. *Adamson v. Parker, et al.* 727.
6. A coroner in discharging the duties of sheriff, may appoint a deputy; and where a writ is returned "executed, H. J. P. cor. by R. E." the reasonable inference is, that R. E. was authorised to act for the coroner. *Ibid.*
7. Where a writ issues otherwise than prescribed by law, it must be abated on the plea of defendant. *Ibid.*
8. A writ issued against two defendants, and was returned executed generally, but there was another return, certifying that one of the defendants was not found; a second writ, similar to the first, was issued returnable to the next term, and executed on the defendant not previously served. At an adjourned term, holden about three months after the second writ was served, a judgment was rendered against the defendants by their omission to gainsay the action: *Held*, that the first writ was not executed on both the defendants;

PROCESS—CONTINUED.

that the term to which the second was returnable, was the appearance term, and that at which the judgment was rendered was a mere continuation of it. *Dupree & Hampton v. Smith*. 736.

See Practice at Law, 11, 31, 32, 33.

See Executors and Administrators, 4.

See Partners and Partnership, 7.

RIGHT OF PROPERTY, TRIAL OF.

1. Upon a trial of right of property, the claimant cannot question the validity of the judgment or regularity of the execution. *Harrell v. Floyd and wife*. 16.
2. Whenever a claim to property levied on, has been interposed in due form, the constable is released from damages at the suit of the claimant. *Murray, adm'r v. Ezell*. 148.
3. Where a case, of the trial of the right of property, is removed from a justice of the peace to the county or circuit court, on the trial of the appeal, the execution is admissible evidence, without producing the judgment. *Ibid*.
4. Although the claimant of property is inhibited from withdrawing his claim, the plaintiff in execution may submit to a non-suit. *Ibid*.
5. In a case where property levied on is claimed, and after trial is subjected to the payment of the execution, by the verdict of a jury, which also assesses damages for the frivolous claim, it is irregular to render judgment against the claimant for the debt, damages and costs, to be levied on the property subjected; but such a judgment can not be reversed at the instance of the claimant, because he is not injuriously affected by the irregularity. *Lee v. Bryan*. 278.

SALE OF CHATTELS.

1. It is a general rule of the common law, that by the mere contract of sale, the property in the thing sold, passes to the vendee, yet he is not invested with a right to the possession, if no credit was agreed upon, until the price is paid or tendered. *Magee v. Billingley*. 679.
2. Where the sale is perfect, the goods are placed at the buyers risk, even before delivery, and if they perish without the sellers fault, the purchaser is bound to pay the agreed price. *Ibid*.
3. Goods are not transferred to the vendee by the contract of sale, if any material acts remain to be done before delivery, to distinguish them, or ascertain their price; or where a sale is made subject to the condition of weighing, counting or measuring, the property does not vest in the buyer until the goods are weighed, counted or measured. *Ibid*.
4. Upon a sale of goods by sample, there is an implied warranty by the seller that the bulk of the commodity is equal in quality to the sample exhibited to the buyer; and if it does not correspond, the purchaser may refuse to receive it, or if received, he may return it in a reasonable time, allowed for examination, and thus rescind the contract.—But if he keep the goods and use them as his own after time allowed for inspection, he cannot repudiate the purchase, though he may maintain an action for a breach of the implied warranty. *Ibid*.
5. Where goods are sold by sample, the property passes immediately to the vendee, if the performance of no act is stipulated by either party as a condition precedent, and the loss resulting from their destruction must be borne by him, if they were of the quality indicated by the sample; if they were not of that quality, their destruction cannot deprive him of the right of repudiating

SALE OF CHATTELS—CONTINUED.

the contract, where a reasonable time had not elapsed for examination, nor can it revive that right, if such time had passed previous to their loss. *Ibid.*

6. Where a contract is made for sale of cotton stored in a warehouse, and an order given to the purchaser, addressed to the warehouse-man, directing the latter to deliver to him the cotton, the *prima facie* inference is, that the seller intended to part with the property and possession to the buyer. *Ibid.*
6. An agreement was entered into to purchase an entire crop of cotton, without reference to quantity, (then in a warehouse where the contract was made) at an agreed sum per pound, all of which had been weighed by a public weigher within seven days preceding; the price was to be paid when called for, within a few days, and an order on the warehouse-man was given to the purchaser: *Held*, that weighing was not annexed by the parties as a term of the contract necessary to complete the sale, and the law would not imply it in the absence of proof showing it was contemplated, inasmuch as it was not necessary to ascertain the aggregate sum to be paid. *Ibid.*

See Contract, 15.

See Principal and Agent, 8.

SCIRE FACIAS.

1. Although a *scire facias* may not have lain at common law, to revive a judgment in a personal action, where no execution had issued thereon within a year and day after its rendition, yet the long continued practice in this State, of thus reviving such judgments, before our statute upon this subject, tacitly modified the common law. *Elliott v. Mayfield and wife*. 223.
2. Upon the return of an original *scire facias*, "not found," an order was made for the issuance of an *alias sci. fa.* and thereupon, a writ issued in form an original, with the words "*alias sci. fa.*" written at its head—*Held*, that it might be regarded as an *alias writ*; and that the defect was one of form, amendable (under the statute) on motion. *Ibid.*
3. A *scire facias* to revive a decree of the Orphans' court, called upon the defendant to show cause, why the decree should not be revived. &c. it was adjudged that the plaintiffs have execution of the decree, &c.—*Held*, that the order or decree upon the *scire facias* was unobjectionable. *Ibid.*
4. The death of the defendant, J. K., was suggested of record, and a *scire facias* directed to issue to his representatives, without naming them, or characterizing them as executors or administrators; a *sci. fa.* issued, describing R. L. W. and W. R. H. as executors, and was served on them, but they were not formally made parties. The cause in the margin of the judgment, is thus stated—"Robert Geddes & Co. v. Joshua Kennedy's ex'rs," and the entry recites that the parties came by their attorneys, and thereupon came a jury, &c. the judgment is, that the plaintiffs recover against the defendants, to be levied of the goods, &c. of J. K., deceased, in the hands of R. L. W. and W. R. H., his executors, to be administered: *Held*, that the judgment and its recitals was a waiver of all informality, and equivalent to an express assent to be made defendants. *Kennedy's ex'rs v. Geddes & Co.* 581.

SET-OFF.

1. A debt, to be the subject of a set-off, must be a subsisting demand at the time of the commencement of the suit. *Cox v. Cooper*. 256.
2. A surety who pays the debt for which he is bound, after the commencement of a suit against him, for the recovery of a debt which he owes in his own right, cannot, in such action, set-off the debt thus paid by him, as the surety of the plaintiff. *Ibid.*

SET-OFF—CONTINUED.

3. When a motion is made, in the mode provided by statute, against a justice of the peace, for a refusal to pay over money collected by him, in his official capacity, he will not be permitted to set-off costs due to him in other cases, for the payment of which the plaintiff may be liable. *Harper v. Howard*. 284.
4. A note made negotiable and payable at Bank, is not subject to off-set in the hands of a *bona fide* indorsee, who has acquired it previous to maturity, although it has never been negotiated at the Bank where it is made payable. *McDonald v. Husted*. 297.

See Evidence, 25.

See Statute of Limitations, 2.

SHERIFF AND SURETIES.

1. On a motion against a sheriff, suggesting that by due diligence, the money due on an execution could have been made, a traverse of the allegations of the suggestion, would be an issue under the statute. *Hallett v. Lee and others*. 28.
2. The sheriff may plead to such a suggestion any matter in excuse or avoidance, which would negative the allegation of want of proper diligence.—*Ibid.*
3. A plea, which merely states that the execution was levied a short time before the return day, a delivery bond taken and returned forfeited, without showing a sufficient excuse for the delay, is bad. *Ibid.*
4. It is the duty of the sheriff to provide himself with a sufficient number of competent deputies to enable him to execute the mandates of the court within the time prescribed by law. *Ibid.*
5. The payment of an execution to a sheriff, on the first day of the term of the court to which it is returnable, is unauthorised; and if the money is retained by the sheriff, the plaintiff can not recover of him and his sureties, on motion, for the failure to pay it over, on demand. *The Farmers' Bank of Chattahoochie v. Reid, sheriff, &c. and Benson, his surety*. 299.
6. Under the act of 1841, "the more effectually to enforce the performance of the duties of sheriffs," it is not necessary, in a motion against the sureties of the sheriff, to show that the sheriff has been notified of the intended motion. *Williamson & Daniel v. The Branch Bank at Montgomery*. 504.
7. In a motion against a sheriff and his sureties for failing to pay over money collected upon an execution, notice to the former is sufficient to authorise a judgment against all of them. *Reid, sheriff, &c. and his sureties v. The Planters' and Merchants' Bank of Mobile*. 712.
8. In a proceeding against a sheriff and his sureties for failing to pay over money collected on execution, unless it is expressly or impliedly waived, the fact of suretyship must appear from the record to have been proved to the court. But if the sureties appear and submit the case to a jury, their suretyship need not be proved, unless they have denied the execution of the sheriff's bond by plea. *Ibid.*
9. The plea of "*not guilty*" by the sheriff to the motion against himself and sureties, does not relieve the plaintiff from the necessity of proving the suretyship of the latter in order to charge them. *Ibid.*
10. Upon a motion by the principal sheriff against his deputy, it is necessary that the record should show that the deputy had one days notice of the proceeding against the principal sheriff for the default of the deputy—that a judgment was obtained against him for such default and its amount—that he

SHERIFF AND SURETIES—CONTINUED.

was in fact his deputy, and the others sought to be charged, his sureties.—
Stephens, et al. v. Womack. 738.

11. It is not necessary that the liability of the principal sheriff to the plaintiff in execution be shewn; nor is any notice to the deputy and his sureties necessary of the intended motion of the principal sheriff against them. *Ibid.*

See Partners and Partnership, 3.

See Constitutional Law, 5.

See Lien, 5, 6.

STATUTES.

1. The oath which the act of 23d December, 1837, to obtain the testimony of a party to the suit, requires to be made of the materiality of the testimony sought to be obtained, may be made by a stranger to the suit, and therefore sufficient if made by the attorney of the party. *Young v. The adm'rs of McLemore.* 295.
2. Where two statutes are so repugnant to each other that they can not stand together, the latter will repeal the former; but so far as they can consist together, they should be sustained, as the law does not favor a repeal by implication. *Kinney v. Mallory.* 626.
3. The act of February, 1839, "to abolish attornies fees in certain cases," inhibits the rendition of a judgment in an action brought for the collection of money, at the appearance term: unless it be by *express* consent. *Dupreo & Hampton v. Smith.* 736.

See Deposition, 3.

See Evidence, 25.

See Bonds, 3, 8, 9.

See Legacy and Distributive Share, 4.

SUMMARY PROCEEDINGS.

1. On a motion against a sheriff, suggesting that by due diligence, the money due on an execution could have been made, a traverse of the allegation of the suggestion, would be an issue under the statute. *Hallett v. Lee and others.* 28.
2. The sheriff may plead to such a suggestion any matter in excuse or avoidance, which would negative the allegation of want of proper diligence.—*Ibid.*
3. A plea, which merely states that the execution was levied a short time before the return day, a delivery bond taken and returned forfeited, without showing a sufficient excuse for the delay, is bad. *Ibid.*
4. It is the duty of the sheriff to provide himself with a sufficient number of competent deputies to enable him to execute the mandates of the court within the time prescribed by law. *Ibid.*
5. Where the penalty against a constable, for failing to return an execution, was the amount of the judgment, and for failing to pay over the money on demand, after satisfaction of the execution, was the amount of the judgment, and ten *per centum* per month damages—*Held*, that as the latter included the former, the insertion of both in the notice, for the motion, could not be objected to, after a verdict finding all the allegations true, but would have been a valid objection to the motion, if it had not been waived by taking issue on the facts. *Morgan, Mann and Ball v. Billings.* 172.
6. The penalty of ten per cent. per month, on the amount of the judgment, against a constable, for failing to pay over money made by him on an execution, can be computed only from the time of the demand made. *Ibid.*

SUMMARY PROCEEDINGS—CONTINUED.

7. When a motion is made, in the mode provided by statute, against a justice of the peace, for a refusal to pay over money collected by him, in his official capacity, he will not be permitted to set-off costs due to him in other cases, for the payment of which the plaintiff may be liable. *Harper v. Howard*.—284.
8. When a statute gives a summary remedy, by motion, and is silent with respect to the notice to be given to the defendant, he is entitled to reasonable notice. To support a judgment in such a case, it must affirmatively appear that such notice was given, and such notice will not be inferred from a statement on the record, that the parties came by their attorneys. *Brown, et al. v. Wheeler*. 287.
9. In the summary proceeding given by statute, in favor of a security against his principal, to recover money paid on a judgment, it is necessary to connect the instrument, by which the security was bound, with the judgment paid by him. *Ibid*.
10. In such a case, if judgment is rendered for interest on the sum paid, the record must show the time when the security paid the debt, if the liability is not ascertained by verdict. *Ibid*.
11. *Query*—Whether any summary proceeding can be had under the act of 1821, by the surety to a writ of error bond, when the judgment is rendered against him in the supreme court, inasmuch as the motion is to be made in the court where the judgment was rendered. *Ibid*.
12. Upon a motion to the court to direct the application of money in the hands of the sheriff, if there is no controversy about the facts, there is no necessity for impannelling a jury. *Pickard, et als. v. Peters, use, &c.* 493.
See Bank, 1, 2, 3.
See Jurisdiction, 2.
See Executors and Administrators, 3.
See Sheriff and Sureties, 6.

SUPERSEDEAS.

1. Where an execution is unauthorised by the judgment, a *supersedeas* is the proper remedy, or when the court, from which it issued, is in session, a motion to quash will be entertained. *Crenshaw, guardian, &c. v. Hardy*.—653.
2. A *supersedeas* is not grantable to suspend or arrest an execution, upon an allegation which is not sustained by the record. *Holloway v. Washington*. 668.
3. The act of the Legislature which confers upon Judges of the county court within their respective counties, power concurrent with the Judges of the circuit court, to grant writs of *certiorari* and *supersedeas*, does not authorise a Judge of the former court to supersede an execution issued by a justice of the peace, unless the *supersedeas* issue as ancillary to a *certiorari* which removes the cause from the justice, for a trial *de novo*. *Gray, et al. v. Dennis*. 716.

SURETY.

1. A surety paying a debt, stands in the place of the creditor, and is entitled to the benefit of all securities which the creditor had for the payment of his debt. But he can not assert a lien, in virtue of the instrument on which he is surety, as that becomes *functus officio*, by the payment of the debt secured by it. *Foster v. The Trustees of the Athenæum*. 302.
2. A surety of a vendee, who is compelled to pay the purchase money, has no lien in equity upon the land. *Ibid*.

SURETY—CONTINUED.

3. A number of gentlemen associated themselves together, to establish a female school, of which one W was the nominal head; and purchased a house for the contemplated school, of D, at the price of six thousand dollars; of which sum two thousand dollars was paid down, in the funds of the association, and the residue secured, to be paid by two bills of exchange, drawn by one L on W, and by him accepted. The bills were payable to, and endorsed by one H to F, by him to R S F, and by him to D, the vendor of the land, who thereupon conveyed the premises to W. The company were afterwards incorporated, and the first bill which fell due, was paid with the funds of the corporation. Afterwards, W conveyed the property to the corporation, taking from four persons, (F being one) who describe themselves as trustees of the corporation, a covenant to indemnify him from liability on his acceptance of the last bill of exchange. F was sued on the bill as endorser, and compelled to pay it, and filed his bill asserting a lien in equity, on the house purchased from D, to the extent of the sum paid by him, in preference to certain creditors of the corporation, who had obtained from it a deed of trust on the house, with notice of his lien: *Held*, First, that F was a mere surety for the corporation, and that the payment by him of a part of the purchase money, gave him no lien on the land. Second. That neither D nor W had any lien in equity, on the land to which F could be subrogated,—admitting he had such a right—That D had no such lien, because he had taken the security of two persons for the payment of a part of the purchase money who were not members of the corporation; and that although W could not have been compelled to make title to the company until they had paid the purchase money for which he was bound, he had voluntarily relinquished this advantage, on being indemnified by F and others, and could not be permitted afterwards to assert it. *Ibid*.
4. A confession of judgment by the principal debtor, in favor of the creditor, and stay of execution by him until the next term of the court, without the knowledge or consent of the surety, is not such a giving day of payment as will exonerate the surety from liability to the creditor. *Fletcher v. Gamble*. 335.
5. A surety in a promissory note, which the principal had also secured by a mortgage on real estate, gave notice to the mortgagee to proceed forthwith on the mortgage, or require another surety in his stead: at the time the notice was given, the mortgaged premises were of value sufficient to pay the debt, but when sold eighteen months afterwards, they had depreciated in value, and fell short of paying it *fifty per cent.* or more—*Held*, that the surety could not, by notice, require the creditor to proceed upon the mortgage, that being a security collateral to his contract to pay; and that the creditor had his election to proceed on the note or mortgage, but might have been required to sue on the note. *The Branch of the Bank of the State of Alabama at Montgomery v. Perdue*. 409.
6. A surety for the payment of the purchase money of land, may be entitled to subrogation of the vendor's mortgage, in case of payment, but when this is conceded, it will not warrant him in resisting payment, on the ground that he can not have relief under the mortgage, unless the vendor relieves a prior incumbrance created by himself. A surety is bound in the same manner and to the same extent as his principal, and if the latter is satisfied with the purchase, it can not be rescinded by the surety for a defect in the security afforded by the title executed. *Lyon v. Leavitt, et al.* 430.
7. It is no defence to the surety in a forth-coming bond, that the property levied on does not belong to the principal. *Jemison v. Cozens*. 636.

SURETY—CONTINUED.

8. A creditor cannot be compelled to exhaust his remedy against the principal debtor before he resorts to the surety, unless under peculiar circumstances, rendering it proper that a court of chancery should interfere. *Abercrombie v. Knox, Snodgrass, et als.* and cross bill of *Riddle v. Abercrombie* and others. 728.

See Set-off, 2.

See Summary Proceedings, 11,

See Contract, 1, 2.

See Delivery Bond, 1.

See Execution and Writ of, 7, 10.

See Executors and Administrators, 10,

TITLES TO LANDS SOUTH OF LATITUDE 31.

1. All grants of any portion of the lands ceded to the United States by the Treaty of Paris of 1803, subsequently to the Treaty of St. Ildefonso, of 1800, excepting such as were made to actual settlers, previous to the 20th of December of 1803, are null and void. *Doe, ex dem. Pollard's heirs v. Files.* 47.
2. Congress does not possess the constitutional power to grant the shore of the navigable waters within this State; and the fact that the grantee had an inoperative Spanish grant for the same, cannot legalize the act of Congress.—*Ibid.*

TROVER.

See Action, 2.

TRUST AND TRUSTEE.

1. Trustees are responsible for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other; or have, by their own voluntary co-operation, or connivance, enable each other to accomplish some known object in violation of the trust. *Taylor v. Roberts,* 83.
2. If one purchase lands with his own money, in the name of another, a trust will, in general, result in favor of him who advances the money; but this presumption may be repelled, by the circumstances of the case, and is confined to those cases where the money is advanced at the time of the purchase.—*Foster v. The Trustees of the Athenæum.* 302.

See Mortgage, 3, 4, 5.

USURY.

1. When a note is made for the purpose of being sold by the payee, at a greater discount than the legal rate of interest, and is sold to one who is ignorant of the purposes for which the note was made, the latter is not chargeable with usury; and although the note in his hands would be liable to be scaled to the amount paid for it, as having no other consideration to support it, yet if the parties subsequently give a new note, the defence arising out of the consideration can not be made, as it is equivalent to a new promise to pay, without disclosing the defect in the consideration. *Cameron and Johnson v. Nall.* 158.
2. Usury is a defence personal to the party agreeing to pay it, or those who stand in his place as representatives. *Fenno, et al. v. Sayre & Converse.* 458.
3. The statutes against usury were intended for the benefit of the borrower; they confer a personal privilege on him, which he may waive, and if he does, no one else can take advantage of them. *Cook & Kornegay v. Dyer.* 643.
4. D hold a deed of trust of C, on land and slaves, more than sufficient to satis-

USURY—CONTINUED.

fy a debt due from C, but consisting entirely of usurious interest. C. & K. had also a deed of trust on the same property, to secure to them a debt due from C. but subsequent in point of time to the deed of D. By an arrangement entered into by all the parties, C & K accepted a bill of exchange drawn on them by C in favor of D, on condition that D should enter satisfaction on the record of his deed of trust, which he accordingly did; and C & K sold the property conveyed thereby, and appropriated it to the payment, in part, of their debt due from C.—*Held*, that in a suit by D against C & K, on their acceptance, they could not set up the usury in the transaction between D & C, to defeat the action. *Ibid*.

VENDOR AND VENDEE.

1. Chancery will not enforce the specific performance of a contract for the sale of lands, where it appears from the allegations of the bill, that the vendor has no title; for such a decree would be to compel the performance of an unlawful act. *Fitzpatrick, et al. Featherstone and McDougald*. 40.
2. A contract for the purchase of land, will not be rescinded, where the purchaser does not offer to return the land to the vendor; and a bill which alleges the inability of the vendor to make title, but declares the willingness of the vendee to pay the purchase money, upon receiving a complete title, does not authorise a decree to rescind the contract. *Ibid*.
3. The vendor of land, has a lien, in equity, on the land sold for the unpaid purchase money, where he has not taken personal security for its payment, or a distinct collateral security as a pledge or mortgage. *Foster v. The Trustees of the Athenæum*. 302.
4. L purchased from K a lot of land on a credit of one, two and three years, with notice of a mortgage, taking from K a bond for title, on the payment of the purchase money, and with a stipulation that his notes could be satisfied in the notes of solvent men—L afterwards sold to S, without disclosing the fact of the mortgage, but without any practice to conceal it, and assigned to him the title bond of K. By an agreement between all the parties, S executed his note in lieu of the notes of L, which were received by K; S took possession, and on the falling due of the first of his notes, tendered the amount and offered to pay any part of the first note of L unpaid, and demanded a title; and on the declaration of K, of his inability, because of the unsatisfied mortgage, S offered to leave the premises in the condition he found it, and to rescind the contract, which not being acceded to by K, he abandoned the possession—*Held*, 1, That the mere silence of L, of the existence of the mortgage, was not a fraudulent concealment, as S knew that the title was not in L, but in K. and by ordinary diligence could have ascertained the true state of the title. 2, That the substitution of the notes of S for those of L, was not evidence of a change of the original contract. 3, That as the notes for the purchase money were payable in the notes of solvent men, title could not be demanded until the last note fell due. 4, Whether the title could be demanded from the vendor until the solvency of the makers of the notes was ascertained by payment.—*Quere?* *Steele v. Kinkle & Lehr*. 352.
5. When the vendor of land fraudulently induces the vendee to purchase, by showing him lands of a superior quality, which are purchased, and afterwards lands of inferior quality are conveyed, the vendee cannot make a defence at law, when sued for the purchase money. His relief is in equity, which can render complete justice to each party, by rescinding the contract, or allowing compensation. *Calloway v. McElroy & Flannagin*. 406.
6. The interest which the purchaser of land acquires, who has paid part of the

VENDOR AND VENDEE—CONTINUED.

purchase money, and taken a bond to convey the title upon the payment of the residue, may be sold or mortgaged; but the sub-purchaser or mortgagee will take it subject to the equitable lien of the first vendor, *see* *Wright et al. v. Sayre & Converse*. 458.

7. A derivative purchaser without notice, cannot be affected by a defect in his immediate vendor; and if he purchases with notice heg. See himself by the want of notice in such vendor. So, although a purchase founded on a gaming consideration is void as between the parties, or in favor of a *bona fide* purchaser without notice, yet if a third person become the purchaser from the winner for a valuable consideration, without notice of the manner in which he became the proprietor, the title of such person will be valid. *Ibid*.

8. Where a conveyance of land was induced by money lost at gaming, and also cash paid, although the contract is void, yet equity and moral justice require that the purchaser should be reimbursed the cash paid, before his title will be divested in favor of a prior incumbrancer who was not in possession and whose mortgage was not registered. *Ibid*.

See Contract, 8.

See Chancery, 11, 12.

See Fraud, 1.

See Surety, 6.

See Deed and Registration of, 1.

VERDICT.

1. A suit having been commenced by three persons to recover a tract of land, and one dying pending the suit, it was continued in the name of the survivors. The jury found a verdict in their favor "for two undivided thirds of the land, in the declaration mentioned," and assessed damages "by reason of the detention of the premises in the declaration mentioned:" *Held*, that a proper construction of the verdict was, that the damages were assessed for the detention of two-thirds of the land sued for, and not for the detention of the entire tract. *Hines v. Greenlee and Greenlee*. 73.
2. Two persons were joined as defendants, who pleaded the general issue; and thereupon a verdict was returned as follows: "We, the jury, find the issue in favor of the defendant"—*Held*, that the reasonable intendment is, that "defendant" was unintentionally used for defendants, and the verdict is decisive of the case. *Porter v. Cotney and Cotney*. 314.

See Evidence, 34.

See Intendments and Legal Presumptives, 9.

WILL, AND PROBATE OF.

1. *Semble*, the declarations of a father made simultaneously with the execution of a deed of gift to a daughter, that the deed was his will; it would save him the trouble of making a will; he was to enjoy the property during his life, &c. —when coupled with the fact, that he was an habitual drunkard, of but ordinary understanding; and that the deed divested him of the present right of possession of all his estate, both real and personal, satisfactorily show, that he was ignorant of the legal effect of what he did, and that he supposed he was executing a testamentary paper. And a deed executed under such circumstances, may be set aside, on the ground of surprise. *Gibson, et al. v. Carson's adm'r*. 421.

See Legacy and distributive share, 3.

WITNESS.

1. It is no objection to a witness that he married the widow of a co-executor of

WITNESS—CONTINUED.

- the claimant, on a trial of right of property, unless it be shown that her former
sted the estate of his testator, and that the witness obtained by
an estate chargeable with such devastavit. *Harrell v. Floyd*
 2. A look at a memorandum which he has made of facts, for the
purpose of his memory, but must afterwards be able to swear from
his recollection the facts, distinct from the memorandum. *Vastbinder v.*
Metcalf. 100.
 3. If a witness believe in the existence of a God, who will punish falsehood, even
in this life, he is a competent witness, although he may not believe in a future
state of rewards and punishment. *Porter v. Cotney and Cotney.* 314.
 4. One not a physician, can not be called on as a witness, to express his opinion
of the value of medical services rendered to a sick person. Nor will it make
any difference, that a competent witness had previously, in his hearing, ex-
pressed his opinion of the value of the services rendered. *Mock v. Kelly.*—
387.
- See Evidence, 4, 23, 24, 30.*
See Executors and Administrators, 14.

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